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A TREATISE  
ON  
ATTORNEYS AT LAW

BY  
EDWARD M. THORNTON

In Two Volumes

VOLUME II

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# ATTORNEYS AT LAW

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## VOLUME II

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### CHAPTER XVII.

#### ADVICE OF COUNSEL.

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##### *In General.*

§ 365. Scope of Chapter. — This chapter is confined to a discussion of the principles governing the advice of counsel as a defense generally. Elsewhere consideration has been given to the duty of an attorney to advise and inform his client<sup>1</sup> fairly, honestly, and disinterestedly;<sup>2</sup> and to his liability for negligence in

<sup>1</sup> See *supra*, § 155.

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<sup>2</sup> See *supra*, §§ 152-163.

this respect.<sup>3</sup> The effect of the opinion of an attorney-general as a defense for the acts of public officials will be considered hereafter.<sup>4</sup>

**§ 366. In Civil Actions Generally.**—It has been stated heretofore that the client is responsible to third persons for the authorized acts of his attorney,<sup>5</sup> whose negligence while acting within the scope of his authority will be imputed to the client; thus no relief will be extended to one against whom a default judgment has been entered because of the negligence of counsel.<sup>6</sup> So, the advice of counsel will not constitute a defense for the client's torts.<sup>7</sup> But where the client is charged with malice, the fact that he acted in good faith upon the advice of counsel may be shown in rebuttal thereof,<sup>8</sup> and in mitigation of exemplary damages;<sup>9</sup> such evidence, however, is not received in bar of the action,<sup>10</sup> or in mitigation of actual damages.<sup>11</sup> It has also been held that the advice of counsel, sought and given in good faith, should be received for the purpose of showing that persons serving in a representative capacity acted honestly thereon; as where trustees were charged with having erred in judgment, or in a matter of law.<sup>12</sup> So, also, the fact that a sheriff acted in good faith upon the advice of his counsel, in proceeding under a writ of fieri facias,

<sup>3</sup> See *supra*, § 315.

<sup>4</sup> See *infra*, § 728.

<sup>5</sup> See *supra*, §§ 303-304.

<sup>6</sup> See *supra*, § 318. See also *Amestoy Estate Co. v. Los Angeles*, 5 Cal. App. 273, 90 Pac. 42; *Winchester v. Grosvenor*, 48 Ill. 517; *Lowe v. Hamilton*, 132 Ind. 406, 31 N. E. 1117; *Stricker v. Field*, 9 Iowa 366; *Mouser v. Harmon*, 96 Ky. 591, 29 S. W. 448; *Burton v. Wiley*, 26 Vt. 430.

<sup>7</sup> *Chambers v. Upton*, 34 Fed. 473; *Conn v. Rice*, (C. C. A.) 204 Fed. 181; *Jasper v. Purnell*, 67 Ill. 358; *Raver v. Webster*, 3 Iowa 502, 66 Am. Dec. 96.

<sup>8</sup> *Hill v. Ward*, 13 Ala. 310; *Wood v. Etiwanda Water Co.*, 147 Cal. 228, 81 Pac. 512; *Raver v. Webster*, 3 Iowa 502, 66 Am. Dec. 96; *Porter v. Knight*, 63 Iowa 366, 19 N. W. 282;

*Charles City Plow, etc., Co. v. Jones*, 71 Iowa 235, 32 N. W. 280.

<sup>9</sup> *Chambers v. Upton*, 34 Fed. 473; *Gramling-Spaulding Co. v. Parker*, 3 Ala. App. 325, 57 So. 54; *Cochrane v. Tuttle*, 75 Ill. 361; *Raver v. Webster*, 3 Iowa 502, 66 Am. Dec. 96; *Grimestad v. Lofgren*, 105 Minn. 286, 117 N. W. 515, 127 Am. St. Rep. 566, 17 L.R.A. (N.S.) 990; *Brown v. McBride*, 24 Misc. 235, 52 N. Y. S. 620.

<sup>10</sup> *Cochrane v. Tuttle*, 75 Ill. 361.

<sup>11</sup> *Jasper v. Purnell*, 67 Ill. 358; *Cochrane v. Tuttle*, 75 Ill. 361; *Raver v. Webster*, 3 Iowa 502, 66 Am. Dec. 96; *Young v. Gornley*, 120 Iowa 372, 94 N. W. 922.

<sup>12</sup> *Matter of Ball*, 55 App. Div. 284, 66 N. Y. S. 874.

on a doubtful question, may be shown in defense of an action against him for failing to collect on the writ; and this is especially true where the status of the execution plaintiff has not been changed.<sup>13</sup> One who sets up the advice of counsel as a defense must, of course, prove that he made a full and fair statement of the facts to the attorney;<sup>14</sup> should there be a conflict of evidence in this respect, the question becomes one of fact for the jury.<sup>15</sup> Where the testimony is conflicting on the question of the liability of defendant, the admission of testimony of plaintiff that before suing defendant he consulted lawyers and was advised by them to sue defendant and not another, is prejudicial error.<sup>16</sup>

**§ 367. In Proceedings Charging Violation of Law.**—The general rule unquestionably is that the advice of counsel can afford no protection against the punitive consequences of criminal acts.<sup>17</sup> Thus on a trial for murder for the killing of an officer who attempted to dispossess the defendant by virtue of a writ of possession, it was held to be proper to exclude evidence of the advice of counsel to the effect that under certain contingencies the defendant could use force against force in order to maintain possession of the land.<sup>18</sup> So, evidence that an attorney had advised the defendant in a criminal prosecution not to return to the state,

<sup>13</sup> *Green v. Jones*, 39 Ga. 522.

<sup>14</sup> *Barnett v. State*, 89 Ala. 165, 7 So. 414; *Raver v. Webster*, 3 Iowa 502, 66 Am. Dec. 96.

<sup>15</sup> *Charles City Plow, etc., Co. v. Jones*, 71 Iowa 235, 32 N. W. 280.

<sup>16</sup> *Merchants' Nat. Bank v. Townsend*, (Tex.) 147 S. W. 617.

<sup>17</sup> *Alabama*.—*Barnett v. State*, 89 Ala. 165, 7 So. 414.

*New York*.—*People v. Kane*, 60 Hun 585 mem., 15 N. Y. S. 612.

*Pennsylvania*.—*Weston v. Com.*, 111 Pa. St. 251, 2 Atl. 191.

*Rhode Island*.—See *State v. Hunt*, 25 R. I. 75, 54 Atl. 937.

*Texas*.—*Smith v. State*, 46 Tex. Crim. 267, 81 S. W. 936, 108 Am. St. Rep. 991.

*Compare People v. Slayton*, 123 Mich. 397, 82 N. W. 205, 81 Am. St. Rep. 211, wherein it was held that where the respondent, in a prosecution for larceny, claimed that he took the property acting under the advice of counsel, believing it to belong to another, it was error to instruct the jury that the advice of counsel, to be available as a defense, must have been given upon a statement of all the facts; the limitation recognized in actions of malicious prosecution being inapplicable on a trial for larceny, where such advice had no significance except as a circumstance bearing on the good faith of the respondent.

<sup>18</sup> *Smith v. State*, 46 Tex. Crim.

is not admissible to explain his absence therefrom.<sup>19</sup> The mere fact that counsel suggested or advised the making of a false oath is no defense to a charge of perjury predicated thereon;<sup>20</sup> but if the facts are fully and in good faith laid before counsel, and upon them he advises, as a matter of law, that a certain statement may be made which will be the truth, and, honestly acting on this advice, the client swears to the statement, believing that he has been correctly advised, it cannot be said that the oath so taken is wilfully and corruptly false, and hence a charge of perjury cannot be predicated upon it.<sup>1</sup> So also the failure of a bankrupt to schedule, or to turn over to the trustee, certain assets, upon the advice of counsel, to whom the facts have been fully disclosed, and whose advice is sought, received, and acted upon in good faith, and not with the intention of evading the bankruptcy law, will not bar his discharge<sup>2</sup> under section 14 b (4) of the Bankruptcy Act, which imposes such punishment for the removal, destruction, or concealment of property by the bankrupt for the purpose of hindering, delaying or defrauding his creditors.<sup>3</sup> Thus where the question whether a bankrupt's interest in his grandfather's estate was vested or contingent was difficult of solution, and the bankrupt had

267, 81 S. W. 936, 108 Am. St. Rep. 991, *following* *Gallagher v. State*, 28 Tex. App. 247, 12 S. W. 1087. And see *State v. Orraye*, (N. J.) 87 Atl. 121, where the same rule was applied to one seeking under advice of counsel forcibly to take possession of land.

<sup>19</sup> *Aiken v. Com.*, 68 S. W. 849, 24 Ky. L. Rep. 523.

<sup>20</sup> *Welch v. State*, (Tex.) 157 S. W. 916.

<sup>1</sup> *U. S. v. Conner*, 3 McLean 573, 25 Fed. Cas. No. 14,847; *U. S. v. Stanley*, 6 McLean 499, 27 Fed. Cas. No. 16,376; *Hood v. State*, 44 Ala. 81; *Barnett v. State*, 89 Ala. 165, 7 So. 411; *State v. McKinney*, 42 Iowa 205; *Com. v. Clark*, 157 Pa. St. 257, 27 Atl. 723.

<sup>2</sup> *In re Hansen*, 107 Fed. 252, 5 Am. Bankr. Rep. 747; *In re Stoddart*, 114 Fed. 486, 7 Am. Bankr. Rep. 762; *In re Breitling*, 133 Fed. 146, 66 C. C. A. 212, 13 Am. Bankr. Rep. 126; *Woods v. Little*, 134 Fed. 229, 67 C. C. A. 157, 13 Am. Bankr. Rep. 742; *In re Neely*, 134 Fed. 667, 12 Am. Bankr. Rep. 407; *Remmers v. Merchants'-Laclede Nat. Bank*, 173 Fed. 484, 97 C. C. A. 490, 23 Am. Bankr. Rep. 78; *In re Kyte*, 174 Fed. 867, 23 Am. Bankr. Rep. 414; *In re Schreck*, 1 Am. Bankr. Rep. 366; *In re Berner*, 4 Am. Bankr. Rep. 383; *In re Scholfield*, 17 Am. Bankr. Rep. 918; *In re Alleman*, 20 Am. Bankr. Rep. 745.

<sup>3</sup> Fed. Stat. Annot. Supp. 1912 p. 562.

previously been advised by counsel that he had no interest in his grandfather's estate on which he could raise money, it was held that his failure to schedule such interest as a part of his estate in bankruptcy did not preclude his discharge.<sup>4</sup> And where a bankrupt had borrowed the full surrender value on his life insurance, and had been advised by counsel that it was not necessary to mention the policies in his schedules, whereupon he gave them to his wife, it was held that he was not guilty of a fraudulent concealment of assets.<sup>5</sup>

**§ 368. In Proceedings for Contempt.**—It is well settled that the advice of counsel is not a complete defense in proceedings for contempt. Cases of this character usually arise where injunction orders have been violated, but the principle stated is applicable in all proceedings for contempt.<sup>6</sup> Similar rulings have been made where, under the advice of counsel, one refuses to obey a subpoena,<sup>7</sup> or to testify.<sup>8</sup> But, when properly presented, the court will, as a general rule, take into consideration the statement that one charged with contempt of court acted in good faith under the advice of counsel to whom he made a full and fair statement of

<sup>4</sup> *Woods v. Little*, 134 Fed. 229, 67 C. C. A. 157, 13 Am. Bankr. Rep. 742.

<sup>5</sup> *In re Kyte*, 174 Fed. 867, 23 Am. Bankr. Rep. 414.

<sup>6</sup> *United States v. Pokegama Sugar Pine Lumber Co. v. Klamath River Lumber, etc., Co.*, 86 Fed. 538; *Rogers v. Pitt*, 89 Fed. 424.

*Florida*.—*Continental Nat. Bldg., etc., Assoc. v. Scott*, 41 Fla. 421, 26 So. 726.

*Georgia*.—*Smith v. Cook*, 39 Ga. 191.

*Iowa*.—*Lindsay v. Hatch*, 85 Iowa 332, 52 N. W. 226; *Carr v. District Court*, 147 Iowa 663, Ann. Cas. 1913D 378, 126 N. W. 791.

*Michigan*.—*Chapel v. Hull*, 60 Mich. 167, 26 N. W. 874.

*New Jersey*.—*Cape May, etc., R. Co. v. Johnson*, 35 N. J. Eq. 422.

*New York*.—*Hawley v. Bennett*, 4 Paige 163; *Rogers v. Paterson*, 4 Paige 450; *Capet v. Parker*, 3 Sandf. 662; *People v. Rice*, 144 N. Y. 249, 39 N. E. 88; *Ciancimino's Towing, etc., Co. v. Ciancimino*, 62 Hun 623 mem., 17 N. Y. S. 125.

*North Carolina*.—*Green v. Griffin*, 95 N. C. 50; *Weston v. John L. Roper Lumber Co.*, 158 N. C. 270, Ann. Cas. 1913D 373, 73 S. E. 799.

<sup>7</sup> *People v. Reid*, 139 App. Div. 551, 124 N. Y. S. 205; *People v. St. Louis, etc., R. Co.*, 19 Abb. N. Cas. (N. Y.) 1.

<sup>8</sup> *Reynolds v. Parkes*, 2 Dem. (N. Y.) 399. See also *Gihon v. Albert*, 7 Paige (N. Y.) 278.

the facts.<sup>9</sup> The purpose of such consideration is to ascertain whether, in view of the facts, the punishment should be mitigated.<sup>10</sup> The extent of the palliation thus afforded depends upon the character of the advice and the circumstances under which it was given;<sup>11</sup> it will not, however, be carried so far as to relieve the offender from compensating the adverse party for such loss as he may have sustained in consequence of the contempt.<sup>12</sup> Where the court is satisfied that there was no intentional wrong, and that no injury was done, the fact that the contempt was committed because of the offender's reliance on the advice of counsel will, as a rule, be deemed a good excuse, or, at least, to merit only the imposition of a nominal fine;<sup>13</sup> and this is especially true where the

<sup>9</sup> *People v. St. Louis, etc., R. Co.*, 19 Abb. N. Cas. (N. Y.) 1; *People v. Rice*, 144 N. Y. 249, 39 N. E. 88; *Ciancimino's Towing, etc., Co. v. Ciancimino*, 62 Hun 623 mem., 17 N. Y. S. 125; *In re Lizotte*, 32 R. I. 386, 79 Atl. 960, 35 L.R.A.(N.S.) 794.

<sup>10</sup> *United States*.—*Matthews v. Spangenberg*, 15 Fed. 813; *Pokegama Sugar Pine Lumber Co. v. Klamath River Lumber, etc., Co.*, 86 Fed. 538; *Rodgers v. Pitt*, 89 Fed. 424; *Royal Trust Co. v. Washburn, etc., R. Co.*, 113 Fed. 531. See also *In re Watts*, 190 U. S. 1, 23 S. Ct. 718, 47 U. S. (L. ed.) 933, 10 Am. Bankr. Rep. 113; *U. S. v. Goldstein*, 132 Fed. 789, 12 Am. Bankr. Rep. 755; *In re Zier*, 142 Fed. 102, 73 C. C. A. 326, 15 Am. Bankr. Rep. 646; *In re Home Discount Co.*, 117 Fed. 538, 17 Am. Bankr. Rep. 168; *Orr v. Tribble*, 158 Fed. 897, 19 Am. Bankr. Rep. 849; *In re Strobel*, 163 Fed. 380, 20 Am. Bankr. Rep. 751.

*Iowa*.—*Colley v. Gamble*, 117 Iowa 515, 91 N. W. 813.

*New York*.—*People v. St. Louis, etc., R. Co.*, 19 Abb. N. Cas. 1; *Lausing v. Easton*, 7 Paige 364; *Stolls*

*v. Tuska*, 82 App. Div. 81, 81 N. Y. S. 638; *Ciancimino's Towing, etc., Co. v. Ciancimino*, 62 Hun 623 mem., 17 N. Y. S. 125.

*North Carolina*.—*Weston v. John L. Roper Lumber Co.*, 158 N. C. 270, Ann. Cas. 1913D 373, 73 S. E. 799.

*South Carolina*.—*Columbia Water Power Co. v. Columbia*, 4 S. C. 388.

<sup>11</sup> *State v. Harper's Ferry Bridge Co.*, 16 W. Va. 864.

<sup>12</sup> *Power v. Athens*, 19 Hun (N. Y.) 165; *New York Mail, etc., Transp. Co. v. Shea*, 30 App. Div. 374, 52 N. Y. S. 5, reversing 23 Misc. 15, 49 N. Y. S. 951; *Lausing v. Easton*, 7 Paige (N. Y.) 364.

<sup>13</sup> *United States*.—*Denver, etc., R. Co. v. Atchison, etc., R. Co.*, 5 McCrary 287; *Roberts v. Walley*, 14 Fed. 167; *In re Fixen*, 96 Fed. 748, 2 Am. Bankr. Rep. 822.

*New Jersey*.—*Fraas v. Barlement*, 25 N. J. Eq. 84.

*North Carolina*.—See *Green v. Griffin*, 95 N. C. 50.

*Texas*.—*Ex p. Ryan*, 62 Tex. Crim. 19, 136 S. W. 65.

*Virginia*.—*Weiss v. Com.*, 21 Grat. 500.

court entertains any doubt as to whether there was, in fact, a contempt committed.<sup>14</sup> Thus where a sheriff, who was charged with contempt of court in failing to execute the process thereof, shows that he was trying to ascertain the law, and to do his duty with the process, he should not be punished for contempt.<sup>15</sup> In presenting the defense of having acted on the advice of counsel, the name of the counsel should be given, together with the information that was laid before him, and the exact import of his advice. If the advice was written, the writing should be produced; if oral, the fact that it was given, and its precise import, should be verified by the affidavits of the counsel who gave it. The propriety of these rules, and the necessity of adhering to them, will be doubted by none who have any knowledge of the difficulties that beset a court in the due administration of its justice, and of the means too frequently employed to evade its authority.<sup>16</sup>

*In Actions for Malicious Prosecution.*

§ 369. **General Rule.** — It is a rule of universal application in suits for malicious prosecution that the defendant may show in defense the fact that, prior to the institution of the proceedings which are alleged to have been malicious, he consulted a competent attorney to whom he made a full and accurate statement of the facts in good faith, and that the prosecution was instituted in reliance on the advice received by the defendant from the attorney so consulted. In most jurisdictions uncontradicted evidence of this character will be deemed to be a complete defense.<sup>17</sup> Persons

<sup>14</sup> *Mutual Milk & Cream Co. v. Tietjen*, 73 App. Div. 532, 77 N. Y. S. 287.

In *Matter of Granz*, 78 App. Div. 399, 79 N. Y. S. 899, *affirming* 38 Misc. 666, 78 N. Y. S. 260, it was said: "It is only when there is a question as to whether the act complained of is actually a violation of the injunction that advice of counsel can be accepted as an excuse. No such question is presented in this case."

<sup>15</sup> *Harrell v. Feagin*, 59 Ga. 821. See also *Ex p. Ryan*, 62 Tex. Crim. 19, 126 S. W. 65.

<sup>16</sup> *People v. Compton*, 1 Duer (N. Y.) 512.

<sup>17</sup> *England*.—*Ravenga v. Mackintosh*, 2 B. & C. 693, 9 E. C. L. 225.

*Canada*.—See *Lake of the Woods Milling Co. v. Ralston*, 20 Quebec K. B. 536; *Prentiss v. Anderson Logging Co.*, 16 British Columbia 289; *Harris v. Hickey*, 19 West. L. Rep. (British Columbia) 948; *Dundas v.*

learned in the law are the proper advisers of men in doubtful circumstances; and their advice, when fairly obtained, exempts the

*Wilson*, 19 Ont. W. Rep. 17, 2 Ont. W. N. 995; *Meaney v. Reid-Newfoundland Co.*, 39 Nova Scotia 407.

*United States*.—*Stewart v. Sonneborn*, 98 U. S. 187, 25 U. S. (L. ed.) 116; *Cogswell v. Bohn*, 43 Fed. 411; *Stanton v. Goshorn*, 94 Fed. 52, 36 C. C. A. 75; *Cragin v. De Pape*, 159 Fed. 691, 86 C. C. A. 559.

*Alabama*.—*Chandler v. McPherson*, 11 Ala. 916; *Leaird v. Davis*, 17 Ala. 27; *Jordan v. Alabama G. S. R. Co.*, 81 Ala. 220, 8 So. 191; *Shannon v. Simms*, 146 Ala. 673, 40 So. 574; *Goldstein v. Drysdale*, 148 Ala. 486, 42 So. 744; *Stewart v. Blair*, 171 Ala. 147, Ann. Cas. 1913A 925, 54 So. 506.

*Arkansas*.—*Kansas, etc., Coal Co. v. Galloway*, 71 Ark. 351, 74 S. W. 521, 100 Am. St. Rep. 79; *L. B. Price Mercantile Co. v. Cuilla*, 100 Ark. 316, 141 S. W. 194.

*California*.—*Jones v. Jones*, 71 Cal. 89, 11 Pac. 817; *Johnson v. Southern Pac. Co.*, 157 Cal. 333, 107 Pac. 611.

*Colorado*.—*Whitehead v. Jessup*, 2 Colo. App. 76, 29 Pac. 916.

*Delaware*.—*Plummer v. Collins*, 1 Boyce 281, 77 Atl. 750.

*District of Columbia*.—*Staples v. Johnson*, 25 App. Cas. 155.

*Florida*.—*Florida East Coast R. Co. v. Groves*, 55 Fla. 436, 46 So. 294.

*Illinois*.—*Wicker v. Hotchkiss*, 62 Ill. 107, 14 Am. Rep. 75; *Anderson v. Friend*, 71 Ill. 475; *Morrow v. Carnes*, 108 Ill. App. 621; *Conkling v. Whitmore*, 132 Ill. App. 571; *Fitzsimmons v. Mason*, 135 Ill. App. 565; *McClain v. C. F. Adams Co.*, 143 Ill. App. 77.

*Indiana*.—*Indianapolis Traction, etc., Co. v. Henby*, 97 N. E. 313.

*Iowa*.—*Greenlee v. Ealy*, 145 Iowa 394, 124 N. W. 166.

*Kansas*.—*Schippel v. Norton*, 38 Kan. 567, 16 Pac. 804; *Atchison, T., etc., R. Co. v. Brown*, 57 Kan. 785, 48 Pac. 31.

*Kentucky*.—*Nance v. Cash*, 143 Ky. 358, 136 S. W. 619; *Mesker v. McCort*, 44 S. W. 975; *National L., etc., Ins. Co. v. Gibson*, 101 S. W. 895.

*Louisiana*.—*Gould v. Gardner*, 8 La. Ann. 12; *Phillips v. Bonham*, 16 La. Ann. 387; *Sandoz v. Veazie*, 106 La. 202, 30 So. 767; *Gates v. Union Sawmill Co.*, 122 La. 437, 47 So. 761; *Hammar v. Atkins*, 124 La. 897, 50 So. 787.

*Maine*.—*Watt v. Corey*, 76 Me. 87.

*Massachusetts*.—*Stone v. Swift*, 4 Pick. 389, 16 Am. Dec. 349; *Allen v. Codman*, 139 Mass. 136, 29 N. E. 537; *Monaghan v. Cox*, 155 Mass. 487, 30 N. E. 467, 31 Am. St. Rep. 555.

*Michigan*.—*Galloway v. Burr*, 32 Mich. 332; *Fletcher v. Chicago, etc., R. Co.*, 109 Mich. 363, 67 N. W. 330; *Fowles v. Hayden*, 129 Mich. 586, 89 N. W. 339; *Slater v. Walter*, 148 Mich. 650, 112 N. W. 682.

*Minnesota*.—*Moore v. Northern Pac. R. Co.*, 37 Minn. 147; *Shea v. Cloquet Lumber Co.*, 92 Minn. 348, 1 Ann. Cas. 930, 100 N. W. 111.

*Nebraska*.—*Jensen v. Halstead*, 61 Neb. 249, 85 N. W. 78; *Duffy v. Scheerger*, 91 Neb. 511, 136 N. W. 724.

*Nevada*.—*Ricord v. Central Pac. R. Co.*, 15 Nev. 169.



party who acts upon it from the imputation of proceeding maliciously and without probable cause.<sup>18</sup> If the defendant is not in fault, but is advised upon a statement of facts fairly presented by him to a professional man whose candor and skill he has no reason to doubt, the advice received will be a sufficient protection for him, even though it is erroneous and not warranted by the facts presented.<sup>19</sup> This defense is an affirmative one, and it is incumbent

*Ohio*.—Eihlert *v.* Gommoll, 23 Ohio Cir. Ct. Rep. 586.

*Oklahoma*.—El Reno Gas, etc., Co. *v.* Spurgeon, 30 Okla. 88, 118 Pac. 397.

*Pennsylvania*.—Replogle *v.* Frothingham, 16 Pa. Super. Ct. 374; Thomas *v.* Painter, 10 Phila. 409, 32 Leg. Int. 90.

*Rhode Island*.—Bartlett *v.* Brown, 6 R. I. 37, 75 Am. Dec. 675; Newton *v.* Weaver, 13 R. I. 616.

*South Dakota*.—Krause *v.* Bishop, 18 S. D. 298, 100 N. W. 434.

*Tennessee*.—Cooper *v.* Flemming, 114 Tenn. 40, 84 S. W. 801, 68 L.R.A. 849.

*Texas*.—R. F. Scott Grocer Co. *v.* Kelly, 14 Tex. Civ. App. 136, 36 S. W. 140.

*Utah*.—McKenzie *v.* Canning, 131 Pac. 1172.

*Vermont*.—St. Johnsbury, etc., R. Co. *v.* Hunt, 59 Vt. 294, 7 Atl. 277.

*Virginia*.—Saunders *v.* Baldwin, 112 Va. 431, Ann. Cas. 1913B 1049, 71 S. E. 620, 34 L.R.A.(N.S.) 958.

*Wisconsin*.—King *v.* Apple River Power Co., 131 Wis. 575, 11 Ann. Cas. 951, 111 N. W. 668, 120 Am. St. Rep. 1063; Topolewski *v.* Plankinton Packing Co., 143 Wis. 52, 126 N. W. 554.

*Wyoming*.—Boyer *v.* Bugher, 19 Wyo. 463, 120 Pac. 171.

<sup>18</sup> Steed *v.* Knowles, 79 Ala. 446. And see the two following sections.

<sup>19</sup> *Alabama*.—Jordan *v.* Alabama G. S. R. Co., 81 Ala. 220, 8 So. 191; Abingdon Mills *v.* Grogan, 167 Ala. 146, 52 So. 596.

*Colorado*.—Van Meter *v.* Bass, 40 Colo. 78, 90 Pac. 637, 18 L.R.A.(N.S.) 49.

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*Michigan*.—Kompass *v.* Light, 122 Mich. 86, 80 N. W. 1008; Fleckinger *v.* Taffee, 149 Mich. 678, 113 N. W. 311.

*Minnesota*.—Nelson *v.* International Harvester Co., 117 Minn. 298, 135 N. W. 808.

*New York*.—Richardson *v.* Virtue, 2 Hun 208; Hall *v.* Suydam, 6 Barb. 83.

*Ohio*.—Johnson *v.* McDaniel, 5 Ohio Dec. 717.

*Pennsylvania*.—Walter *v.* Sample, 25 Pa. St. 275.

*Rhode Island*.—Bartlett *v.* Brown, 6 R. I. 37, 75 Am. Dec. 675.

*Tennessee*.—Cooper *v.* Flemming, 114 Tenn. 40, 84 S. W. 801, 68 L.R.A. 849.

*West Virginia*.—Catzen *v.* Belcher, 64 W. Va. 314, 16 Ann. Cas. 715, 61 S. E. 930, 131 Am. St. Rep. 903.

on the defendant to establish it,<sup>20</sup> its value being dependent upon the honesty and intelligence of the adviser, and the circumstances under which it was obtained.<sup>1</sup> If the facts essential to the defense are in dispute, they are to be submitted to the jury.<sup>2</sup> So, the question of collusion between the attorney and his client in these cases can as safely be left to the jury as can the question of collusion and fraud in other cases.<sup>3</sup> Where the facts are undisputed the court will usually decide, as a matter of law, whether they amount to a sufficient defense to the action.<sup>4</sup> In some jurisdictions, however, the fact that the defendant acted in good faith on the advice of counsel is not considered a complete defense to an action for malicious prosecution, but merely a circumstance to be taken into consideration by the jury as tending to show the absence of malice, or the existence of probable cause, or both;<sup>5</sup> but, even where this rule is recognized, it has been held that acting on the advice of the public prosecutor will, of itself, constitute an independent and complete defense.<sup>6</sup>

<sup>20</sup> *Barhight v. Tammany*, 158 Pa. St. 545, 28 Atl. 135, 38 Am. St. Rep. 853; *Humphreys v. Mead*, 23 Pa. Super Ct. 415.

<sup>1</sup> *Clement v. Major*, 8 Colo. App. 86, 44 Pac. 776.

<sup>2</sup> *Hicks v. Brantley*, 102 Ga. 264, 29 S. E. 459; *Monaghan v. Cox*, 155 Mass. 487, 30 N. E. 467, 31 Am. St. Rep. 555; *LeClear v. Perkins*, 103 Mich. 131, 61 N. W. 357, 26 L.R.A. 627; *Hogg v. Pinckney*, 16 S. C. 388.

<sup>3</sup> *Gillispie v. Stafford*, 4 Neb. (unofficial) Rep. 873, 96 N. W. 1039.

<sup>4</sup> *Nance v. Cash*, 143 Ky. 358, Ann. Cas. 1912D 422, 136 S. W. 619; *Krause v. Bishop*, 18 S. D. 298, 100 N. W. 434.

<sup>5</sup> *Alabama*.—*Abingdon Mills v. Grogan*, 57 So. 42.

*Arkansas*.—*Lemay v. Williams*, 32 Ark. 166.

*Georgia*.—*Fox v. Davis*, 55 Ga. 298.

*Indiana*.—*Lytton v. Baird*, 95 Ind. 349; *Atkinson v. Van Cleave*, 25 Ind.

App. 508, 57 N. E. 731; *Sasse v. Rogers*, 40 Ind. App. 197, 81 N. E. 590.

*Iowa*.—*Mesher v. Iddings*, 72 Iowa 553, 34 N. W. 328.

*New York*.—*Laird v. Taylor*, 66 Barb. 139.

*North Carolina*.—*Beal v. Robeson*, 30 N. C. 276; *Davenport v. Lynch*, 51 N. C. 545; *Smith v. Eastern Bldg., etc., Assoc.*, 116 N. C. 74, 20 S. E. 963; *Downing v. Stone*, 152 N. C. 525, 21 Ann. Cas. 753, 68 S. E. 9, 136 Am. St. Rep. 841.

*Pennsylvania*.—*Bell v. Atlantic City R. Co.*, 202 Pa. St. 178, 51 Atl. 600; *Humphreys v. Mead*, 23 Pa. Super. Ct. 415.

*Texas*.—*Ramsey v. Arrott*, 64 Tex. 320; *Gulf, etc., R. Co. v. James*, 73 Tex. 12, 10 S. W. 744, 15 Am. St. Rep. 743.

<sup>6</sup> *Sebastian v. Cheney*, 86 Tex. 502, 25 S. W. 692; *Missouri, etc., R. Co. v. Groseclose*, 50 Tex. Civ. App. 525,

§ 370. **Reason of Rule.**—The ground upon which the opinion of an attorney may be shown as an excuse for bringing a prosecution is that he is an officer of the court, held out to the public as one learned in the law, and that, because thereof, a client has a right to presume that he will give him a fair, unbiased, and well-grounded opinion as to his legal rights.<sup>7</sup> This is true from the very nature of our criminal laws; otherwise there would be no safety in originating such proceedings. As the criminal law must be enforced, and human agencies must be employed for that purpose, the law wisely protects all persons who in good faith act on reasonable presumptions of the guilt of the accused; and where the prosecution is commenced on the advice of competent counsel, after fairly presenting to his consideration all the facts, it cannot, in the nature of things, be held that such prosecution is groundless or malicious.<sup>8</sup> It is not the advice, however, which rebuts the presumption of malice, but the innocence of the defendant's conduct, of which his seeking advice is merely evidence; and whether the advice is a good defense depends upon the good faith with which it is sought and followed.<sup>9</sup> Thus a defendant in an action for malicious prosecution, being himself a lawyer and acting as his own adviser in the matter, cannot shelter himself behind his

110 S. W. 477. And see *infra*, § 377.

<sup>7</sup> *United States*.—Burnap v. Albert, Taney 244, 4 Fed. Cas. No. 2,170.

*Maine*.—White v. Carr, 71 Me. 555, 36 Am. Rep. 533.

*Massachusetts*.—Wilder v. Holden, 24 Pick. 8.

*Michigan*.—Perry v. Sulier, 92 Mich. 72, 52 N. W. 801.

*Oklahoma*.—El Reno Gas, etc., Co. v. Spurgeon, 30 Okla. 88, 118 Pac. 397.

*Rhode Island*.—Bartlett v. Brown, 6 R. I. 37, 75 Am. Dec. 675.

*South Dakota*.—Krause v. Bishop, 18 S. D. 298, 100 N. W. 434.

*Virginia*.—Saunders v. Baldwin, 112 Va. 431, Ann. Cas. 1913B 1049, 71 S. E. 620, 34 L.R.A.(N.S.) 958.

<sup>8</sup> *United States*.—Miller v. Chicago, M. & St. P. R. Co., 41 Fed. 898.

*Alabama*.—Steed v. Knowles, 79 Ala. 446.

*Illinois*.—Anderson v. Friend, 85 Ill. 135.

*Michigan*.—Stanton v. Hart, 27 Mich. 539.

*South Dakota*.—Krause v. Bishop, 18 S. D. 298, 100 N. W. 434.

*Texas*.—Ramsey v. Arrott, 64 Tex. 320.

*Wisconsin*.—King v. Apple River Power Co., 131 Wis. 575, 11 Ann. Cas. 951, 111 N. W. 668, 120 Am. St. Rep. 1063; Topolewski v. Plankinton Packing Co., 143 Wis. 52, 126 N. W. 554.

<sup>9</sup> Smith v. Walter, 125 Pa. St. 453, 17 Atl. 466.

own advice as counsel;<sup>10</sup> but the fact that the defendant is an attorney does not prevent him from setting up, in defense, that he acted upon the advice of another lawyer whom he consulted, and to whom he made a full and accurate statement of the facts.<sup>11</sup>

**§ 371. Whether Advice of Counsel Shows Absence of Malice, or Existence of Probable Cause.** — Many of the cases which pass upon the effect of having acted in good faith under the advice of competent counsel show a conflict of opinion as to whether such advice is to be considered as establishing the absence of malice on the part of the defendant, or as showing the existence of probable cause for the institution of the proceeding upon which the action for malicious prosecution is predicated. A considerable number insist that the proper effect of the advice is to show the absence of malice,<sup>12</sup> while an equal, and possibly a greater, number of adjudicated cases assert that the advice of counsel tends to show the existence of probable cause.<sup>13</sup> The effect, however, is the same, no matter which of these views may be adopted; that is, in either case, the fact that a proceeding was commenced in good

<sup>10</sup> *Epstein v. Berkowsky*, 64 Ill. App. 498.

<sup>11</sup> *Terre Haute & I. R. Co. v. Mason*, 148 Ind. 578, 46 N. E. 332.

<sup>12</sup> *United States*.—*Brewer v. Jacobs*, 22 Fed. 217.

*Illinois*.—*Chicago, R. I. & P. R. Co. v. Pierce*, 98 Ill. App. 368.

*Indiana*.—*Lytton v. Baird*, 95 Ind. 349; *Wright v. Hanna*, 98 Ind. 217.

*Kansas*.—*Atchison, T. & S. F. R. Co. v. Brown*, 57 Kan. 785, 48 Pac. 31.

*Louisiana*.—*Womack v. Fudikar*, 47 La. Ann. 33, 16 So. 645.

*Maryland*.—*Turner v. Walker*, 3 Gill & J. 377, 22 Am. Dec. 329.

*Missouri*.—*Sparling v. Conway*, 75 Mo. 510; *Smith v. Glynn*, 144 S. W. 149.

*North Carolina*.—*Davenport v. Lynch*, 51 N. C. 545; *Smith v. East-*

*ern Bldg., etc., Assoc.*, 116 N. C. 73, 20 S. E. 963; *Thurber v. Eastern Bldg., etc., Assoc.*, 116 N. C. 75, 21 S. E. 193; *Pittsburg, etc., R. Co. v. Wakefield Hardware Co.*, 143 N. C. 54, 55 S. E. 422.

*Ohio*.—*Johnson v. McDaniel*, 5 Ohio Dec. 717.

*Pennsylvania*.—*Sommer v. Wilt*, 4 Serg. & R. 24; *Emerson v. Cochran*, 111 Pa. St. 619, 4 Atl. 498; *Smith v. Walter*, 125 Pa. St. 453, 17 Atl. 466; *Baker v. Moore*, 29 Pa. Super. Ct. 301.

<sup>13</sup> *Arkansas*.—*L. B. Price Mercantile Co. v. Cuilla*, 100 Ark. 316, 141 S. W. 194.

*California*.—*Levy v. Brannan*, 39 Cal. 485; *Johnson v. Southern Pac. Co.*, 157 Cal. 333, 107 Pac. 611.

*District of Columbia*.—*Porter v. White*, 5 Mackey 180.

faith on the advice of competent counsel, to whom a full and accurate statement of the facts was made, will constitute a good defense to an action for malicious prosecution; and, proceeding on this theory, many cases hold that such advice, so acted upon, tends to prove both the absence of malice and the existence of probable cause.<sup>14</sup> Strictly speaking, it would seem that taking advice of counsel and acting thereon rebuts the inference of malice arising from the want of probable cause.<sup>15</sup>

*Indiana*.—Henderson *v.* McGruder, 49 Ind. App. 682, 98 N. E. 137.

*Iowa*.—Dorr Cattle Co. *v.* Des Moines Nat. Bank, 127 Iowa 153, 98 N. W. 918.

*Michigan*.—Poupard *v.* Dumas, 105 Mich. 326, 63 N. W. 301; Le Clear *v.* Perkins, 103 Mich. 131, 61 N. W. 357, 26 L.R.A. 627; Pawlowski *v.* Jenks, 115 Mich. 275, 73 N. W. 238; Smith *v.* Tolan, 158 Mich. 89, 122 N. W. 513.

*Missouri*.—Sharpe *v.* Johnston, 59 Mo. 557.

*New York*.—Richardson *v.* Virtue, 2 Hun 208; Hall *v.* Suydam, 6 Barb. 83.

*Oklahoma*.—El Reno Gas, etc., Co. *v.* Spurgeon, 30 Okla. 88, 118 Pac. 397.

*Oregon*.—Hess *v.* Oregon German Baking Co., 31 Ore. 503, 49 Pac. 803.

*Pennsylvania*.—Walter *v.* Sample, 25 Pa. St. 275; Fisher *v.* Forrester, 33 Pa. St. 501; Baker *v.* Moore, 29 Pa. Super. Ct. 301.

*Rhode Island*.—Bartlett *v.* Brown, 6 R. I. 37, 75 Am. Dec. 675.

*Tennessee*.—Cooper *v.* Flemming, 114 Tenn. 40, 84 S. W. 801, 68 L.R.A. 849.

*Vermont*.—St. Johnsbury, etc., R. Co. *v.* Hunt, 59 Vt. 294, 7 Atl. 277.

*Virginia*.—Saunders *c.* Baldwin, 112 Va. 431, Ann. Cas. 1913B 1049, 71 S. E. 620, 34 L.R.A.(N.S.) 958.

*Washington*.—Simmons *v.* Gardner, 46 Wash. 282, 89 Pac. 887; Anderson *v.* Seattle Lighting Co., 71 Wash. 155, 127 Pac. 1108.

*Wisconsin*.—King *v.* Apple River Power Co., 131 Wis. 575, 11 Am. Cas. 951, 111 N. W. 668, 120 Am. St. Rep. 1063.

<sup>14</sup> *Alabama*.—Steed *v.* Knowles, 79 Ala. 446; Jordan *v.* Alabama G. S. R. Co., 81 Ala. 220, 8 So. 191; O'Neal *v.* McKima, 116 Ala. 606, 22 So. 905.  
*Georgia*.—Fox *v.* Davis, 55 Ga. 298.

*Illinois*.—Palmer *v.* Richardson, 70 Ill. 544; Skidmore *v.* Bricker, 77 Ill. 167.

*Indiana*.—Flora *v.* Russell, 138 Ind. 153, 37 N. E. 593.

*Louisiana*.—Sandoz *v.* Veazie, 106 La. 202, 30 So. 767.

*Maine*.—Soule *v.* Winslow, 66 Me. 447.

*Michigan*.—Slater *v.* Walter, 148 Mich. 650, 112 N. W. 682.

*New Hampshire*.—Eastman *v.* Keasor, 44 N. H. 518.

*Oklahoma*.—El Reno Gas, etc., Co. *v.* Spurgeon, 30 Okla. 88, 118 Pac. 397.

*Wisconsin*.—Strehlow *v.* Pettit, 96 Wis. 22, 71 N. W. 102.

<sup>15</sup> McClafferty *v.* Philp, 151 Pa. St. 86, 24 Atl. 1042; Replogle *v.* Frothingham, 16 Pa. Super. Ct. 374; Ramsey *v.* Arrott, 64 Tex. 320.

### § 372. Bona Fides in Seeking and Acting upon Advice. —

It is well settled that the advice of counsel, in order to constitute a defense to an action for malicious prosecution, must have been sought and acted upon in good faith.<sup>16</sup> If counsel is sought simply for protection against indulging the client's malice,<sup>17</sup> or to enable him to use the law for unjust and oppressive purposes or for his private gain and advantage,<sup>18</sup> it will not only afford him no defense,<sup>19</sup> but will be rather an element of increased damages.<sup>20</sup> Nor will the advice of counsel constitute a defense where the client

<sup>16</sup> *England*. — *Ravenga v. Mackintosh*, 2 B. & C. 693, 9 E. C. L. 225.

*Alabama*. — *Sloss-Sheffield Steel, etc., Co., v. O'Neal*, 169 Ala. 83, 52 So. 953; *Abingdon Mills v. Grogan*, 57 So. 42.

*California*. — *Potter v. Seale*, 8 Cal. 217.

*Illinois*. — *Roy v. Goings*, 112 Ill. 656; *Thomas v. Kerr*, 137 Ill. App. 479.

*Indiana*. — *Indianapolis Traction, etc., Co. v. Henby*, 97 N. E. 313.

*Iowa*. — *Parkhurst v. Masteller*, 57 Ia. 474, 10 N. W. 864; *White v. International Text-Book Co.*, 144 Iowa 92, 121 N. W. 1104.

*Louisiana*. — *Block v. Meyers*, 33 La. Ann. 776.

*Maryland*. — *Moneyweight Scale Co. v. McCormick*, 109 Md. 170, 72 Atl. 537.

*Massachusetts*. — *Wills v. Noyes*, 12 Pick. 324; *Connerly v. Manning*, 163 Mass. 44, 39 N. E. 558.

*Michigan*. — *Josselyn v. McAllister*, 22 Mich. 299; *People v. Long*, 50 Mich. 249, 15 N. W. 105; *Davis v. McMillan*, 142 Mich. 391, 7 Ann. Cas. 854, 105 N. W. 862, 113 Am. St. Rep. 585, 3 L.R.A.(N.S.) 928.

*Minnesota*. — *Cole v. Curtis*, 16 Minn. 182; *Jeremy v. St. Paul Boom*

*Co.*, 84 Minn. 516, 88 N. W. 13; *Nelson v. International Harvester Co.*, 117 Minn. 298, 135 N. W. 808.

*Mississippi*. — *Kehl v. Hope Oil-Mill, etc., Co.*, 77 Miss. 762, 27 So. 641.

*New York*. — *Kingsbury v. Garden*, 45 Super. Ct. 224.

*Pennsylvania*. — *Radeliffe v. Hollyfield*, 216 Pa. St. 367, 65 Atl. 789.

*Vermont*. — *Powell v. Woodbury*, 85 Vt. 504, 83 Atl. 541.

*Wisconsin*. — *Billingsley v. Maas*, 93 Wis. 176, 67 N. W. 49; *Rogers v. Van Eps*, 143 Wis. 396, 127 N. W. 1006.

<sup>17</sup> *Neufeld v. Rodeminski*, 144 Ill. 83, 32 N. E. 913; *Stevens v. Fassett*, 27 Me. 266; *Fugate v. Millar*, 109 Mo. 284, 19 S. W. 71.

<sup>18</sup> *Neufeld v. Rodeminski*, 144 Ill. 83, 32 N. E. 913; *Freeman v. Wright*, 113 Ill. App. 159; *McCarthy v. Kitchen*, 59 Ind. 500; *Glascock v. Bridges*, 15 La. Ann. 672; *Grundy v. Crescent News, etc., Co.*, 38 La. Ann. 974; *Jacobs v. Crum*, 62 Tex. 401; *Klein-smith v. Hamlin*, (Tex.) 60 S. W. 994.

<sup>19</sup> *Neufeld v. Rodeminski*, 144 Ill. 83, 32 N. E. 913.

<sup>20</sup> *Ross v. Innis*, 26 Ill. 259; *Neufeld v. Rodeminski*, 144 Ill. 83, 32 N. E. 913.

did not rely thereon,<sup>1</sup> or where, irrespective of the advice received, he believed the proceeding to be unfounded;<sup>2</sup> and this is especially true if he received from another, learned in the law, whose counsel he sought, advice of a contrary character upon the question involved.<sup>3</sup> Whether a defendant, in an action for malicious prosecution, acted in good faith on the advice of the attorney, is generally for the jury.<sup>4</sup>

**§ 373. Requisite Statement of Facts.**—It is well settled that, to be effective as a defense, the advice of counsel must be based on a knowledge of the facts; therefore, it is incumbent on the party setting up this defense to show that, prior to receiving the advice upon the strength of which he claims to have subsequently commenced the prosecution which is alleged to have been malicious and without probable cause, he made a fair, full, and accurate statement of all the material facts within his knowledge to the counsel whose advice he sought and depends upon;<sup>5</sup> and the force of testimony of this character is, in a large measure, to be determined by the truthfulness and extent of the disclosure so

<sup>1</sup> *McCarthy v. Kitchen*, 59 Ind. 500. See also *Allew v. Codman*, 139 Mass. 136, 29 N. E. 537; *Martin v. Corseaden*, 34 Mont. 308, 86 Pac. 33.

<sup>2</sup> *Vann v. McCreary*, 77 Cal. 434, 19 Pac. 826; *McCarthy v. Kitchen*, 59 Ind. 500; *Center v. Springs*, 2 Iowa 393; *Acton v. Coffman*, 74 Iowa 17, 36 N. W. 774; *Johnson v. Miller*, 82 Iowa 693, 47 N. W. 903, 48 N. W. 1081, 31 Am. St. Rep. 514; *Pipkin v. Hauke*, 15 Mo. App. 373.

<sup>3</sup> *Stevens v. Fassett*, 27 Me. 266.

<sup>4</sup> *Sloss-Sheffield Steel, etc., Co. v. O'Neal*, 169 Ala. 83, 52 So. 953; *Abingdon Mills v. Grogan*, (Ala.) 57 So. 42; *Nelson v. International Harvester Co.*, 117 Minn. 298, 135 N. W. 808; *Powell v. Woodbury*, 85 Vt. 504, 83 Atl. 541.

<sup>5</sup> *United States v. Blunt v. Little*, 3 Mason 102, 3 Fed. Cas. No. 1,578.

*Alabama*.—*Steed v. Knowles*, 79 Ala. 446.

*California*.—*Bliss v. Wyman*, 7 Cal. 257; *Wild v. Odell*, 56 Cal. 136; *Dawson v. Schloss*, 93 Cal. 194, 29 Pac. 31; *Holliday v. Holliday*, 123 Cal. 26, 55 Pac. 703.

*Colorado*.—*Wyatt v. Burdette*, 43 Colo. 208, 95 Pac. 336; *Whitehead v. Jessup*, 2 Colo. App. 76, 29 Pac. 916.

*Georgia*.—*Shores v. Brooks*, 81 Ga. 468, 8 S. E. 429, 12 Am. St. Rep. 332; *Baker v. Langley*, 3 Ga. App. 751, 60 S. E. 371.

*Illinois*.—*Ames v. Snider*, 69 Ill. 377; *Davie v. Wisher*, 72 Ill. 262; *Beidler v. Beirnaert*, 25 Ill. App. 422; *Daily v. Donath*, 100 Ill. App. 52; *Thomas v. Kerr*, 137 Ill. App. 479.

*Indiana*.—*Paddock v. Watts*, 116 Ind. 147, 18 N. E. 518, 9 Am. St. Rep. 832; *Lawrence v. Leathers*, 31 Ind.

made.<sup>6</sup> The term "full and fair statement of all the facts" does not mean all the facts discoverable, but all the facts within the knowledge of the person making the statement. If he knows facts enough, either personally or by creditable information, which, when fairly and fully stated to reputable counsel for the purpose of obtaining legal guidance, result in advice which is honestly followed in commencing criminal proceedings, that is sufficient.<sup>7</sup> It need not appear that the defendant, in making his disclosure to counsel, acted in a judicial or entirely impartial manner; it is enough if he acted as a reasonable and prudent person

App. 414, 68 N. E. 179; *Indianapolis Traction & Terminal Co. v. Henby*, 97 N. E. 313.

*Iowa*.—*Logan v. Maytag*, 57 Iowa 107, 10 N. W. 311; *Johnson v. Miller*, 69 Iowa 562, 29 N. W. 743, 58 Am. Rep. 231.

*Kansas*.—*Clark v. Baldwin*, 25 Kan. 121.

*Kentucky*.—*Gatz v. Harris*, 134 Ky. 550, 121 S. W. 462; *Weddington v. White*, 148 Ky. 671, 147 S. W. 17.

*Louisiana*.—*Cointement v. Cropper*, 41 La. Ann. 303, 6 So. 127; *Weil v. Israel*, 42 La. Ann. 955, 8 So. 826; *King v. Erskins*, 116 La. 480, 40 So. 844.

*Massachusetts*.—*Monaghan v. Cox*, 155 Mass. 487, 30 N. E. 467, 31 Am. St. Rep. 555; *Black v. Buckingham*, 174 Mass. 102, 54 N. E. 494.

*Michigan*.—*Thurston v. Wright*, 77 Mich. 96, 43 N. W. 860; *Bennett v. Eddy*, 120 Mich. 300, 79 N. W. 481.

*Minnesota*.—*Norrell v. Vogel*, 39 Minn. 197, 38 N. W. 705.

*Missouri*.—*Sappington v. Watson*, 50 Mo. 83.

*Nebraska*.—*Jonasen v. Kennedy*, 39 Neb. 313, 58 N. W. 122; *Rosenblatt v. Rosenberg*, 1 Neb. (unofficial) Rep. 656, 95 N. W. 686.

*New York*.—*Howe v. Oldham*, 69

Hun 57, 23 N. Y. S. 703; *Davidoff v. Wheeler, etc., Mfg. Co.*, 14 Misc. 456, 35 N. Y. S. 1019, *affirmed* 16 Misc. 31, 37 N. Y. S. 661; *Willard v. Holmes*, 2 Misc. 303, 51 N. Y. St. Rep. 569; *Thompson v. Lumley*, 50 How. Pr. 105.

*Oklahoma*.—*El Reno Gas, etc., Co. v. Spurgeon*, 30 Okla. 88, 118 Pac. 397.

*Pennsylvania*.—*Leahy v. March*, 155 Pa. St. 458, 26 Atl. 701.

*South Dakota*.—*Jackson v. Bell*, 5 S. D. 257, 58 N. W. 671; *Wuest v. American Tobacco Co.*, 10 S. D. 394, 73 N. W. 903.

*Virginia*.—*Forbes v. Hagman*, 75 Va. 168; *Evans v. Atlantic Coast Line R. Co.*, 105 Va. 72, 53 S. E. 3.

*Washington*.—*Baer v. Chambers*, 67 Wash. 357, Ann. Cas. 1913D 559, 121 Pac. 843.

*Wisconsin*.—*Haas v. Powers*, 130 Wis. 406, 110 N. W. 205; *Rogers v. Van Eps*, 143 Wis. 396, 127 N. W. 1006.

*Wyoming*.—*Boyer v. Bugher*, 19 Wyo. 463, 120 Pac. 171.

<sup>6</sup> *Whitfield v. Westbrook*, 40 Miss. 311. And see the following section.

<sup>7</sup> *Henderson v. McGruder*, 49 Ind. App. 682, 98 N. E. 137; *King v. Apple River Power Co.*, 131 Wis. 575,



would ordinarily act under like circumstances.<sup>8</sup> Any evasion or concealment by the prosecutor in his statement of the case to his counsel, or any failure on his part to make a full disclosure of all the facts within his knowledge concerning it, will deprive him of the protection which advice founded upon an honest, fair and full presentation of the case affords.<sup>9</sup> The safer plan is to submit all the facts to counsel and let him judge of their materiality for himself.<sup>10</sup> It has been held that if, after the filing of an original complaint for a criminal prosecution, those who instituted such proceeding learn facts showing the innocence of the accused, they are not liable for merely withholding such information from the prosecuting attorney, as the case is then in his hands; but they are liable if they still insist upon, urge, and demand the prosecution

11 Ann. Cas. 951, 111 N. W. 668, 120 Am. St. Rep. 1063; Topolewski v. Plankinton Packing Co., 143 Wis. 52, 126 N. W. 554, 35 L.R.A.(N.S.) 353.

<sup>8</sup> Penney v. Johnston, 142 Ill. App. 634.

<sup>9</sup> England.—Hewlett v. Cruchley, 5 Taunt. 277, 1 E. C. L. 107.

United States.—Cuthbert v. Gallo-way, 35 Fed. 466.

Indiana.—Scotten v. Longfellow, 40 Ind. 24; Henderson v. McGruder, 49 Ind. App. 682, 98 N. E. 137; Indianapolis Traction, etc., Co. v. Henby, 97 N. E. 313.

Iowa.—Center v. Spring, 2 Iowa 393; White v. International Text-Book Co., 144 Iowa 92, 121 N. W. 1104; Dorr Cattle Co. v. Des Moines Nat. Bank, 127 Iowa 153, 4 Ann. Cas. 519, 98 N. W. 918.

Kentucky.—Gatz v. Harris, 134 Ky. 550, 121 S. W. 462.

Maine.—Stevens v. Fassett, 27 Me. 266.

Michigan.—Josselyn v. McAllister, 22 Mich. 299; Peterson v. Toner, 80 Attys. at L. Vol. II.—41.

Mich. 350, 45 N. W. 346; Davis v. McMillan, 142 Mich. 391, 7 Ann. Cas. 854, 105 N. W. 862, 113 Am. St. Rep. 585, 3 L.R.A.(N.S.) 928.

Nebraska.—Peterson v. Reisdorph, 49 Neb. 529, 68 N. W. 943; Jensen v. Halstead, 61 Neb. 249, 85 N. W. 78; Miles v. Walker, 66 Neb. 728, 92 N. W. 1014.

New York.—Lathrop v. Mathers, 143 App. Div. 376, 128 N. Y. S. 492; Willard v. Holmes, 2 Misc. 303, 21 N. Y. S. 998.

Ohio.—Broerman v. Ryan, 6 Ohio Cir. Dec. 15.

Pennsylvania.—Barhight v. Tammany, 158 Pa. St. 545, 28 Atl. 135, 38 Am. St. Rep. 853; Radcliffe v. Hollyfield, 216 Pa. St. 367, 65 Atl. 789; Replogle v. Frothingham, 16 Pa. Super. Ct. 374.

Texas.—Missouri, etc., R. Co. v. Groseelose, 134 S. W. 736.

Wisconsin.—Palmer v. Broder, 78 Wis. 483, 47 N. W. 744.

Wyoming.—Boyer v. Bugher, 19 Wyo. 463, 120 Pac. 171.

<sup>10</sup> Hill v. Palm, 38 Mo. 13.

of the accused.<sup>11</sup> The defendant has the burden of establishing the fact that he made the requisite statement of fact to the attorney whose advice he acted upon,<sup>12</sup> and, to sustain this burden, he should show precisely what facts, information, and circumstances were communicated by him to his counsel.<sup>13</sup> The witness cannot testify that he related all the facts and circumstances without stating what they were, as that would be the statement of a conclusion by him.<sup>14</sup> The inferences to be drawn from the facts are for the jury,<sup>15</sup> unless, of course, the facts are uncontroverted; in that case the legal result follows as a matter of course.<sup>16</sup>

**§ 374. Necessity of Exercising Diligence to Discover Facts.**—The rule stated in the foregoing section is considerably

<sup>11</sup> *Blunk v. Atchison, etc., R. Co.*, 38 Fed. 311.

<sup>12</sup> *Wyatt v. Burdette*, 43 Colo. 208, 95 Pac. 336; *Struby-Estabrook Mercantile Co. v. Kyes*, 9 Colo. App. 190, 48 Pac. 663; *Wuest v. American Tobacco Co.*, 10 S. D. 394, 73 N. W. 903.

<sup>13</sup> *Watt v. Corey*, 76 Me. 87; *Cooper v. Utterbach*, 37 Md. 282; *Jonasen v. Kennedy*, 39 Neb. 313, 58 N. W. 122.

<sup>14</sup> *Jonasen v. Kennedy*, 39 Neb. 313, 58 N. W. 122; *Jensen v. Halstead*, 61 Neb. 249, 85 N. W. 78.

<sup>15</sup> *Alabama*.—*Goldstein v. Drysdale*, 148 Ala. 486, 42 So. 744; *Abingdon Mills v. Grogan*, 167 Ala. 146, 52 So. 596, 57 So. 42; *Sloss-Sheffield Steel, etc., Co. v. O'Neal*, 169 Ala. 83, 52 So. 955; *Stewart v. Blair*, 171 Ala. 147, Ann. Cas. 1913A 925, 54 So. 506.

*Arkansas*.—*Harr v. Ward*, 73 Ark. 437, 84 S. W. 496; *Wells v. Parker*, 76 Ark. 41, 6 Ann. Cas. 259, 88 S. W. 602.

*District of Columbia*.—*Staples v. Johnson*, 25 App. Cas. 155.

*Illinois*.—*Gruel v. Mengler*, 74 Ill. App. 36; *Thomas v. Kerr*, 137 Ill. App. 479.

*Kansas*.—*Drake v. Vickery*, 81 Kan. 519, 106 Pac. 290.

*Kentucky*.—*Gatz v. Harris*, 134 Ky. 550, 121 S. W. 463; *Weddington v. White*, 148 Ky. 671, 147 S. W. 17.

*Massachusetts*.—*Connery v. Manning*, 163 Mass. 44, 39 N. E. 558.

*Michigan*.—*Webster v. Fowler*, 89 Mich. 303, 50 N. W. 1074; *Thompson v. Price*, 100 Mich. 558, 59 N. W. 253; *Burlbanks v. Lepovsky*, 134 Mich. 384, 96 N. W. 456; *Phiscator v. Rice*, 147 Mich. 411, 110 N. W. 1095.

*Minnesota*.—*Nelson v. International Harvester Co.*, 117 Minn. 298, 135 N. W. 808.

*Missouri*.—*Carp v. Queen Ins. Co.*, 203 Mo. 295, 101 S. W. 78.

*Nebraska*.—*Jonasen v. Kennedy*, 39 Neb. 313, 58 N. W. 122.

*New York*.—*Ames v. Rathbun*, 55 Barb. 194.

*Pennsylvania*.—*Radeliffe v. Hollyfield*, 216 Pa. St. 367, 65 Atl. 789.

*Wisconsin*.—*Haas v. Powers*, 130 Wis. 406, 110 N. W. 205.

<sup>16</sup> *King v. Apple River Power Co.*, 131 Wis. 575, 11 Ann. Cas. 951, 111 N. W. 668, 120 Am. St. Rep. 1063.

broadened by some of the adjudicated cases; thus it is held to be necessary not only to make a full, fair, and accurate statement of the facts known to the client, but also to show that such statement included a recitation of any facts which might have been learned by the exercise of ordinary diligence.<sup>17</sup> It is evident, however, that what will amount to this degree of diligence must in all instances depend on the facts in each case, and is at best problematical. A better statement of the rule would seem to be that if the

<sup>17</sup> *Alabama*.—Steed *v.* Knowles, 79 Ala. 446; Motes *v.* Bates, 80 Ala. 382; Abingdon Mills *v.* Grogan, 167 Ala. 146, 52 So. 596; Stewart *v.* Blair, 171 Ala. 147, Ann. Cas. 1913A 925, 54 So. 506.

*California*.—Serivani *v.* Dondero, 128 Cal. 31, 60 Pac. 463.

*Colorado*.—Wyatt *v.* Burdette, 43 Colo. 208, 95 Pac. 336.

*Indiana*.—Galloway *v.* Stewart, 49 Ind. 156, 19 Am. Rep. 677.

*Iowa*.—Dorr Cattle Co. *v.* Des Moines Nat. Bank, 127 Iowa 153, 4 Ann. Cas. 519, 98 N. W. 918; White *v.* International Text-Book Co., 144 Iowa 92, 121 N. W. 1104.

*Kansas*.—Clark *v.* Baldwin, 25 Kan. 120; Atchison, etc., R. Co. *v.* Brown, 57 Kan. 785, 48 Pac. 31; Drake *v.* Vickery, 81 Kan. 519, 106 Pac. 290.

*Kentucky*.—Ahrens, etc., Mfg. Co. *v.* Hoehner, 106 Ky. 692, 51 S. W. 194; Gatz *v.* Harris, 134 Ky. 550, 121 S. W. 462; Smith *v.* Fields, 139 Ky. 60, 129 S. W. 325, 30 L.R.A.(N.S.) 870; Weddington *v.* White, 148 Ky. 671, 147 S. W. 17; Nance *v.* Cash, 143 Ky. 358, Ann. Cas. 1912D 422, 136 S. W. 619.

*Louisiana*.—Kirk *v.* Wiener-Loeb Laundry Co., 120 La. 820, 45 So. 738.

*Maine*.—White *v.* Carr, 71 Me. 555, 36 Am. Rep. 533.

*Maryland*.—Moneyweight Scale Co. *v.* McCormick, 109 Md. 170, 72 Atl. 537.

*Missouri*.—Hill *v.* Palm, 38 Mo. 13; Fugate *v.* Millar, 109 Mo. 281, 19 S. W. 71; Carp *v.* Queen Ins. Co., 203 Mo. 295, 101 S. W. 78; Pipkin *v.* Haucke, 15 Mo. App. 373; Butcher *v.* Hoffman, 99 Mo. App. 239, 73 S. W. 266.

*Nebraska*.—Jensen *v.* Halstead, 61 Neb. 249, 85 N. W. 78; Duffy *v.* Scheerger, 91 Neb. 511, 136 N. W. 724.

*North Dakota*.—Merchant *v.* Pielke, 10 N. D. 48, 84 N. W. 574.

*Oklahoma*.—El Reno Gas, etc., Co. *v.* Spurgeon, 30 Okla. 88, 118 Pac. 397.

*Oregon*.—Hess *v.* Oregon German Baking Co., 31 Ore. 503, 49 Pac. 803.

*Pennsylvania*.—Barbight *v.* Tammany, 158 Pa. St. 545, 28 Atl. 135, 38 Am. St. Rep. 853; Beihofer *v.* Loeffert, 159 Pa. St. 374, 28 Atl. 216; Replogle *v.* Frothingham, 16 Pa. Super. Ct. 374.

*Texas*.—Missouri, K. & T. R. Co. *v.* Grosclose, 50 Tex. Civ. App. 525, 110 S. W. 477.

*Virginia*.—Evans *v.* Atlantic Coast Line R. Co., 105 Va. 72, 53 S. E. 3.

*Wyoming*.—Boyer *v.* Bugher, 19 Wyo. 463, 120 Pac. 171.

client has reasonable ground for believing that facts exist which would tend to exculpate the accused from the charge, good faith requires that he shall either make further inquiry with reference to those facts and communicate the information obtained to counsel, or that he shall inform him of his belief in their existence, in order that counsel may investigate or direct investigation with respect to them, and take into account, in forming his opinion, any information so discovered;<sup>18</sup> but he is not required to institute a blind inquiry to ascertain whether facts exist which would have a tendency to exculpate the party accused.<sup>19</sup> It is urged against this rule that by its enforcement one commencing a criminal prosecution with the most malicious motives and entire want of probable cause might shield himself behind the advice of an unscrupulous or incompetent attorney. In reply to this it may be said that dishonest parties often take advantage of the most beneficent legal rules in an attempt to escape punishment or liability on account of their wrongdoing; and the fact that injustice may occasionally arise because of a rule of law founded on reason and public policy ought not to operate in its disfavor. Public policy and the enforcement of criminal laws require that, where probable cause exists to believe one guilty of a criminal offense, a prosecution therefor should be instituted; and no citizen commencing such a prosecution with honest motives, and from a desire to enforce the laws of the land, should be made liable in damages because of an honest mistake, or the development of facts in the case of which he was not aware at the time of instituting the action. And the attorney who may be consulted in such a case should go further in his opinion than merely to give his judgment upon the facts disclosed to him; his advice should also cover his belief as to whether sufficient inquiry has been made by the defendant to ascertain any other essential facts which further investigation might disclose.<sup>20</sup> In criminal cases, the public prosecutor is the representative of the

<sup>18</sup> *Johnson v. Miller*, 69 Iowa 562, 29 N. W. 743, 58 Am. Rep. 231; *Hess v. Oregon German Baking Co.*, 31 Ore. 503, 49 Pac. 803; *Putnam v. Stalker*, 50 Ore. 210, 91 Pac. 363. See also *Holliday v. Holliday*, (Cal.) 53 Pac. 42; *Topolewski v. Plankinton*

*Packing Co.*, 143 Wis. 52, 126 N. W. 554.

<sup>19</sup> *Johnson v. Miller*, 69 Iowa 562, 29 N. W. 743, 58 Am. Rep. 231.

<sup>20</sup> *Gillispie v. Stafford*, 4 Neb. (unofficial) Rep. 873, 96 N. W. 1039.

state. He is required, not only to prosecute indictments which are found, but it is his duty to assist in the investigation of charges against individuals which are brought to the attention of the grand jury. He is by law made the legal adviser of the grand jury. When complaint is made to him that a public offense has been committed, it is his duty to investigate the charge, and, if he deems it a matter of sufficient importance to demand the attention of the grand jury, it is also his duty to have the witnesses subpoenaed and brought before that body; and he has the right to appear, also, and assist in their examination. Neither he nor the grand jury are confined in their investigations to the witnesses named by the complainant, but they have the power to send for and examine any witnesses who, they have reason to believe, can give any material evidence bearing on the question of the guilt of the accused. It would, however, be a very harsh rule, and one calculated to discourage entirely the making of complaints by private individuals, to hold that one who has acted on the advice of the district attorney, given upon a full and fair statement of all the material facts which he knew, or which he had reasonable ground to believe, was not protected by the advice of the attorney, simply because he did not, before making the complaint, learn of other material facts, of the existence of which he might have learned by reasonable inquiry.<sup>1</sup> Whether the requisite degree of reasonable diligence has been exercised is a question for the jury to determine.<sup>2</sup>

**§ 375. Requisites as to Advice Received.** — The advice of counsel having been sought in good faith, and the requisite statement of facts having been made, a client who acts honestly on the advice received is not affected by the lack of good faith on the part

<sup>1</sup> *Johnson v. Miller*, 69 Iowa 562, 29 N. W. 743, 58 Am. Rep. 231.

<sup>2</sup> *Alabama*.—*Abingdon Mills v. Grogan*, 167 Ala. 146, 52 So. 596, 57 So. 42.

*Illinois*.—*Anderson v. Friend*, 71 Ill. 475.

*Kentucky*.—*Gatz v. Harris*, 134 Ky.

550, 121 S. W. 463; *Weddington v. White*, 148 Ky. 671, 147 S. W. 17.

*Minnesota*.—*Nelson v. International Harvester Co.*, 117 Minn. 298, 135 N. W. 808.

*Nebraska*.—*Gillispie v. Stafford*, 4 Neb. (unofficial) Rep. 873, 96 N. W. 1039.

of the attorney in giving his opinion,<sup>3</sup> or by the fact that the advice was erroneous in point of law,<sup>4</sup> unless, of course, the client knew or had reason to believe that the advice was not honestly given.<sup>5</sup> If on a full, fair, and accurate statement of the facts, the attorney advises that they are sufficient to warrant the institution of a criminal prosecution, the client is justified in undertaking such a proceeding, providing, of course, that he acts in good faith; and this is particularly true where the facts are laid before the official prosecutor, and the prosecution is begun on his advice.<sup>6</sup> If the prosecuting attorney considers that a given state of facts is sufficient evidence of probable cause, the private citizen cannot be said to be in fault in acting thereon. To hold otherwise would

<sup>3</sup> *Seabridge v. McAdam*, 119 Cal. 460, 51 Pac. 691; *Collins v. Hayte*, 50 Ill. 338, 99 Am. Dec. 521; *Penney v. Johnston*, 142 Ill. App. 634; *Shea v. Cloquet Lumber Co.*, 92 Minn. 348, 1 Ann. Cas. 930, 100 N. W. 111.

<sup>4</sup> *Abingdon Mills v. Grogan*, 167 Ala. 146, 52 So. 596; *Indianapolis Traction, etc., Co. v. Henby*, (Ind.) 97 N. E. 313; *Gatz v. Harris*, 134 Ky. 550, 121 S. W. 463; *Nelson v. International Harvester Co.*, 117 Minn. 298, 135 N. W. 808.

<sup>5</sup> *Shea v. Cloquet Lumber Co.*, 92 Minn. 348, 1 Ann. Cas. 930, 100 N. W. 111.

<sup>6</sup> *Illinois*.—*Ross v. Innis*, 26 Ill. 260; *Ames v. Snider*, 69 Ill. 377; *Anderson v. Friend*, 85 Ill. 135; *Chicago, R. I., etc., R. Co. v. Pierce*, 98 Ill. App. 368; *Abel v. Douney*, 110 Ill. App. 343; *Young v. Lindstrom*, 115 Ill. App. 239; *Fitzsimmons v. Mason*, 135 Ill. App. 565.

*Indiana*.—*Burgett v. Burgett*, 43 Ind. 78.

*Kentucky*.—*Tandy v. Riley*, 80 S. W. 776.

*Michigan*.—*Smith v. Austin*, 49 Mich. 286, 13 N. W. 593; *Huntington*

*v. Gault*, 81 Mich. 144, 45 N. W. 970; *Fletcher v. Chicago, etc., R. Co.*, 109 Mich. 363, 67 N. W. 330; *Christy v. Rice*, 152 Mich. 563, 116 N. W. 200.

*Minnesota*.—*Baldwin v. Capitol Steam Laundry Co.*, 109 Minn. 38, 122 N. W. 460.

*Missouri*.—*Warren v. Flood*, 72 Mo. App. 199; *Pinson v. Campbell*, 124 Mo. App. 260, 101 S. W. 621.

*Nebraska*.—*Maynard v. Sigman*, 65 Neb. 590, 91 N. W. 576.

*New Jersey*.—*Magowan v. Rickey*, 64 N. J. L. 402, 45 Atl. 804.

*Oregon*.—*Hess v. Oregon German Baking Co.*, 31 Ore. 503, 49 Pac. 803.

*Rhode Island*.—*Goldstein v. Foulkes*, 19 R. I. 291, 36 Atl. 9.

*South Dakota*.—*Krause v. Bishop*, 18 S. D. 298, 100 N. W. 434.

*Texas*.—*Lenoir v. Marlin*, 10 Tex. Civ. App. 376, 30 S. W. 566.

*Washington*.—*Simmons v. Gardner*, 46 Wash. 282, 89 Pac. 887.

*Wisconsin*.—*Plath v. Braunsdorff*, 40 Wis. 107; *Brinsley v. Schulz*, 124 Wis. 426, 102 N. W. 918; *Topolewski v. Plankinton Packing Co.*, 143 Wis. 52, 126 N. W. 554; *Hippier v. Quandt*, 145 Wis. 221, 129 N. W. 1099.

be to use the machinery of government as a trap to ensnare those who trust in government for such matters, and who ought to trust in it. If such officers make a mistake, it is an error of the government itself, and a citizen should not be permitted to suffer for his trust in its proper functionaries.<sup>7</sup> If the counsel consulted advises that it is doubtful whether, upon the facts stated, a party is guilty of any crime, the one advised, in thereafter instituting a criminal prosecution, proceeds at his own risk.<sup>8</sup> Where, in an action for malicious prosecution, it appeared that the defendant was present at, but took no part in, an examination of witnesses conducted by the district attorney to ascertain who was probably guilty of a certain crime, and, at the close of the examination, the district attorney, on the information so obtained, advised the defendant that there was sufficient evidence to justify the making of a complaint against the plaintiff, and that the justice, before whom such examination was had, considered the evidence sufficient and issued the warrant; it was held that it was not error to refuse to give instructions applicable to the ordinary defense of advice of counsel, because the advice of counsel was not a defense in such case, but was only one circumstance, among others, by which the defendant sought to establish probable cause.<sup>9</sup> Whether the advice asserted in defense is that of the prosecuting attorney or of private counsel, it must be sought and received prior to the commencement of the alleged malicious prosecution; advice received subsequently thereto is immaterial.<sup>10</sup>

§ 376. **Qualification of Attorney Consulted.**—To render the advice of a counsel available as a defense in actions for malicious prosecution, it must appear that the attorney consulted was one learned in the law.<sup>11</sup> It will be presumed, however, that one duly admitted to practice is learned in the law, as otherwise the

<sup>7</sup> Laughlin *v.* Clawson, 27 Pa. St. 328; Missouri, K. & T. R. Co. *v.* Groseclose, 50 Tex. Civ. App. 525, 110 S. W. 477; Topolewski *v.* Plankinton Packing Co., 143 Wis. 52, 126 N. W. 554.

<sup>8</sup> Cascarella *v.* National Grocer Co., 151 Mich. 15, 114 N. W. 857.

<sup>9</sup> Messman *v.* Ihlenfeldt, 89 Wis. 585, 62 N. W. 522.

<sup>10</sup> Blunt *v.* Little, 3 Mason 102, 3 Fed. Cas. No. 1,578; Pandjiris *v.* Hartman, 196 Mo. 539, 94 S. W. 270; Murphy *v.* Eidlitz, 121 App. Div. 224, 105 N. Y. S. 674.

<sup>11</sup> McCullough *v.* Rice, 59 Ind. 580;

rule under consideration would lead to no end of confusion.<sup>12</sup> But as there is an element of good faith in the selection of counsel, it should at least appear in all cases wherein this defense is set up that the counsel selected is a regularly licensed attorney<sup>13</sup> of good repute.<sup>14</sup> It should also appear that he is not interested in the subject-matter of the consultation;<sup>15</sup> for when he is directly interested therein the client has no right to presume that he will give him an unbiased opinion; and if the client takes and acts upon an opinion received from such a source, and it turns out to be erroneous, it will afford him no justification.<sup>16</sup> Thus where an attorney and his client conspire to institute a prosecution, the latter cannot justify himself by the other's advice.<sup>17</sup> It would be unfair to the other party in interest that the defendant, or any one similarly situated, should be permitted to shield himself by advice from an associate in the very enterprise in which it is claimed that the plaintiff has been injured; and it is no hardship to require the complainant in a criminal case to be advised respecting such matters by one who is not biased by his own personal or pecuniary interests.<sup>18</sup> But the mere fact that the attorney who advised an association not organized for profit and paying no dividends was himself a member of the association does not deprive it

*Monaghan v. Cox*, 155 Mass. 487, 30 N. E. 467, 31 Am. St. Rep. 555.

In *Mortimer v. Thomas*, 23 La. Ann. 165, it was said: "He acted under the advice, however, of a young lawyer, who instituted the proceedings, whose ignorance of the law, although not justifying the arrest, might to some extent mitigate the damages to which his client should be subjected." *Hewlett v. Cruchley*, 5 Taunt. 277, 1 E. C. L. 107; *Murphy v. Larson*, 77 Ill. 172; *Stevens v. Fassett*, 27 Me. 266; *White v. Carr*, 71 Me. 555, 36 Am. Rep. 353; *Watt v. Corey*, 76 Me. 87.

<sup>12</sup> *O'Neal v. McKinna*, 116 Ala. 606, 22 So. 905.

<sup>13</sup> *Murphy v. Larson*, 77 Ill. 172; *Bessler v. Beirnaert*, 25 Ill. App.

422; *Hiersche v. Scott*, 1 Neb. (unofficial) Rep. 48, 95 N. W. 494; *Beal v. Robeson*, 30 N. C. 276; *El Reno Gas, etc., Co. v. Spurgeon*, 30 Okla. 88, 118 Pac. 397.

<sup>14</sup> *Murphy v. Larson*, 77 Ill. 172; *Livingston v. Burroughs*, 33 Mich. 511.

<sup>15</sup> *Smith v. Fields*, 139 Ky. 60, 129 S. W. 325, 30 L.R.A. (N.S.) 870; *Watt v. Corey*, 76 Me. 87; *Gurden v. Stevens*, 146 Mich. 489, 109 N. W. 856.

<sup>16</sup> *White v. Carr*, 71 Me. 555, 36 Am. Rep. 353; *Adkin v. Pillen*, 136 Mich. 682, 100 N. W. 176; *Sherburne v. Rodman*, 51 Wis. 474, 8 N. W. 414.

<sup>17</sup> *Hamilton v. Smith*, 39 Mich. 222.

<sup>18</sup> *Adkin v. Pillen*, 136 Mich. 682, 100 N. W. 176.



of the protection afforded by the advice of counsel.<sup>19</sup> It is for the jury to say whether or not the attorney consulted was a disinterested person, where there is a conflict of evidence with respect to this question.<sup>20</sup>

**§ 377. Advice of Prosecuting Attorney.**—The advice of counsel as a defense in malicious prosecution cases is especially pertinent where the attorney consulted, and whose advice has been acted upon, is the public prosecutor.<sup>21</sup> It is generally conceded that advice so received constitutes a complete defense,<sup>1</sup> even though erroneous,<sup>2</sup> providing, of course, that it was predicated upon a full, fair, and accurate statement of the facts, and was sought and acted upon in good faith.<sup>3</sup>

**§ 378. Advice of Persons Other than Attorneys.**—It is well settled that the advice of persons other than duly licensed attorneys at law does not constitute a defense to an action for malicious prosecution.<sup>4</sup> It is immaterial that the person consulted, and whose advice is relied upon, held himself out as an attorney, and was believed to be such by the party consulting him.<sup>5</sup> So, it will be no defense to show that a prosecution was advised by a

<sup>19</sup> *Albers v. Merchants' Exchange*, 138 Mo. 140, 39 S. W. 473.

<sup>20</sup> *Watt v. Corey*, 76 Me. 87.

<sup>21</sup> *Steed v. Knowles*, 79 Ala. 446; *L. B. Price Mercantile Co. v. Cuilla*, 100 Ark. 316, 141 S. W. 194; *Gilbertson v. Fuller*, 40 Minn. 413, 42 N. W. 203; *Putnam v. Stalker*, 50 Ore. 210, 91 Pac. 363. And see *supra*, § 369, note 6; § 373, note 11; § 374, note 1; and § 375, notes 6, 10.

<sup>1</sup> *Widmeyer v. Felton*, 95 Fed. 926; *Amb's v. Atchison, etc., R. Co.*, 114 Fed. 317; *L. B. Price Mercantile Co. v. Cuilla*, 100 Ark. 316, 141 S. W. 194; *Van Meter v. Bass*, 40 Colo. 78, 90 Pac. 637, 18 L.R.A.(N.S.) 49; *Florida East Coast R. Co. v. Groves*, 55 Fla. 436, 46 So. 294; *El Reno Gas*

& Electric Co. *v. Spurgeon*, 30 Okla. 88, 118 Pac. 397. And see the cross-references given in the note immediately preceding.

<sup>2</sup> *Hicks v. Brantley*, 102 Ga. 264, 29 S. E. 459.

But see *Roy v. Goings*, 112 Ill. 656, wherein the court said that it was not prepared to hold that an attorney, by the mere fact of holding a commission as state's attorney, must be held to be an attorney in good standing for skill, prudence and fairness.

<sup>3</sup> See *supra*, §§ 372, 373.

<sup>4</sup> *Stanton v. Hart*, 27 Mich. 539; *Livingston v. Burroughs*, 33 Mich. 511.

<sup>5</sup> *Murphy v. Larson*, 77 Ill. 172.

justice of the peace, or other magistrate or ministerial officer,<sup>6</sup> even though such magistrate or officer may also be an attorney,<sup>7</sup> unless, of course, he has been consulted as an attorney, and, if so, that fact should be shown by the defendant.<sup>8</sup> Nor is it any defense that the prosecution was commenced on the advice of a police officer,<sup>9</sup> or a detective.<sup>10</sup> The law allows honest action upon the advice of counsel, who have been fully informed on the facts, to be considered as a defense in actions for malicious prosecution upon the sole ground that a person has done all he could be expected to do to enable him to act safely. But it is not the policy of the law to permit innocent men to be subjected to false charges and unfounded arrests; and a person who assumes to prosecute is bound to use all reasonable means to avoid committing such a grievance. Every man of common information is presumed to know that it is not safe, in matters of importance, to trust to the legal opinions of any but recognized lawyers; and no matter is of more

<sup>6</sup> *United States*.—Cook *v.* Proskey, 138 Fed. 273, 70 C. C. A. 563.

*Alabama*.—Marks *v.* Hastings, 101 Ala. 165, 13 So. 297.

*California*.—Cochran *v.* Bones, 1 Cal. App. 729, 82 Pac. 970.

*District of Columbia*.—Coleman *v.* Heinrich, 2 Mackey 189.

*Georgia*.—Rigden *v.* Jordan, 81 Ga. 668, 7 S. E. 857.

*Iowa*.—Necker *v.* Bates, 118 Iowa 545, 92 N. W. 667.

*Maine*.—Finn *v.* Frink, 84 Me. 261, 24 Atl. 851, 30 Am. St. Rep. 348.

*Maryland*.—Straus *v.* Young, 36 Md. 246.

*Massachusetts*.—Olmstead *v.* Partidge, 16 Gray 381.

*Michigan*.—Stanton *v.* Hart, 27 Mich. 539.

*Missouri*.—Williams *v.* Vannmeter, 8 Mo. 339, 41 Am. Dec. 644.

*Oregon*.—Gee *v.* Culver, 12 Ore. 228, 6 Pac. 775.

*Pennsylvania*.—Brobst *v.* Ruff, 100 Pa. St. 91, 45 Am. Rep. 358.

*West Virginia*.—Catzen *v.* Belcher, 64 W. Va. 314, 16 Am. Cas. 715, 61 S. E. 930, 131 Am. St. Rep. 903, *overruling* Sisk *v.* Hurst, 1 W. Va. 53.

*Wisconsin*.—Sutton *v.* McConnell, 46 Wis. 269, 50 N. W. 414.

*Contra*.—Ball *v.* Rawles, 93 Cal. 222, 28 Pac. 937, 27 Am. St. Rep. 174; Thomas *v.* Paynter, 1 W. N. C. (Pa.) 300, *following and criticising* Rosenstein *v.* Feigel, 6 Phila. (Pa.) 532, 25 Leg. Int. 37.

<sup>7</sup> Marks *v.* Hastings, 101 Ala. 165, 13 So. 297; Monaghan *v.* Cox, 155 Mass. 487, 30 N. E. 467, 31 Am. St. Rep. 555; Turner *v.* Dinmegar, 20 Hun (N. Y.) 465.

<sup>8</sup> Cooney *v.* Chase, 81 Mich. 203, 45 N. W. 833.

<sup>9</sup> Bright *v.* Patton, 5 Mackey (D. C.) 534, 60 Am. Rep. 396; Hirsch *v.* Feeney, 83 Ill. 548; Schroeder *v.* Blum, 74 Neb. 60, 103 N. W. 1073.

<sup>10</sup> Breitmesser *v.* Stier, 13 Phila. (Pa.) 80, 36 Leg. Int. 486.

legal importance than private reputation and liberty. It would be very dangerous to relax the rules on this subject. There can never be any difficulty in finding professional advisers under ordinary circumstances. And where the prosecution complained of is a criminal one, there is still less cause for removing any safeguard against oppression and vexatious proceedings. The rule originated in England, where there is no public prosecutor, and where all complaints must usually be made by private parties. They were compelled to employ counsel to prosecute, and it would have been unjust to compel them to do more than use proper diligence and fairness in choosing and instructing them. Under our system all prosecutions are put under official control, and a principal reason for this was the abuses of private prosecutions, which are very apt to be set on foot for private purposes rather than for the public good. The very fact that a person is in doubt should teach him the necessity of caution and lead him to communicate with the proper authorities, and to place the care of the prosecution with them. There is no need in such cases to rely on irregular advisers, and it is a practice not to be favored.<sup>11</sup> But on the theory that when a person resorts to the best means in his power for information, it will be such proof of honesty as will disprove malice and operate as a defense proportionate to his diligence, evidence of the fact that a prosecution was advised by persons other than attorneys, who were consulted in good faith, and to whom the facts were fully stated, has been received in mitigation of punitive, but not of actual, damages.<sup>12</sup>

<sup>11</sup> *Stanton v. Hart*, 27 Mich. 539.

<sup>12</sup> *Murphy v. Larson*, 77 Ill. 172; *Monaghan v. Cox*, 155 Mass. 487, 30 N. E. 467, 31 Am. St. Rep. 555, explaining *Olmstead v. Partridge*, 16

*Gray (Mass.)* 381; *Stanton v. Hart*, 27 Mich. 539; *Livingston v. Burroughs*, 33 Mich. 511; *Parr v. Loder*, 97 App. Div. 218, 89 N. Y. S. 823.

## CHAPTER XVIII.

### CHAMPERTY, BARRATRY, AND MAINTENANCE.

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- 399. Rule in Wisconsin.

*Definitions and Distinctions.*

§ 379. **Champerty Defined.** — Champerty consists of an unlawful agreement to prosecute litigation for another in consideration of receiving the whole, or a part of, or an interest in, the subject-matter of the litigation.<sup>1</sup> To be champertous, the agreement must stipulate for the prosecution or defense of a suit. An agreement which does not so provide may be fraudulent; or, for some other reason, it may be illegal; but it cannot be champertous.<sup>2</sup> It is quite generally conceded that champerty consists of three elements: (1) the absence of any other interest in the case on the part of the champertor than that arising from his champertous contract;<sup>3</sup> (2) the assumption by the champertor of all expenses in conducting the case;<sup>4</sup> (3) a previous agreement for his

<sup>1</sup> *England.*—Stanley v. Jones, 7 Bing. 369, 20 E. C. L. 165, 4 Bl. Com. 135.

*Alabama.*—Price v. Carney, 75 Ala. 546.

*District of Columbia.*—Stanton v. Haskin, 1 MacArthur 558, 29 Am. Rep. 612.

*Georgia.*—Ellis v. Smith, 112 Ga. 480, 37 S. E. 739.

*Michigan.*—Backus v. Byron, 4 Mich. 535.

*Nebraska.*—Omaha & R. V. R. Co. v. Brady, 39 Neb. 27, 57 N. W. 767.

*Ohio.*—Weakly v. Hall, 13 Ohio 167, 42 Am. Dec. 194.

Champerty is a species of maintenance or a bargain with plaintiff to divide property sued for, if they prevail at law: whereupon the champertor is to carry on the suit at his own expense (quoting 2 Words and Phrases, 1047). In re Evans, (Utah) 130 Pac. 217.

"Champerty" at common law consisted in supporting or maintaining a suit for some one else in consideration of agreement to have a part of the thing in dispute, or some profit

out of the result of the litigation, or an agreement to divide the receipts from the suit or action. Merchants' Protective Ass'n v. Jacobsen, 22 Idaho 636, 127 Pac. 315.

<sup>2</sup> Burnham v. Heselton, 84 Me. 578, 24 Atl. 955; Moody v. Harper, 38 Miss. 599. Compare Rust v. Larue, 4 Litt. (Ky.) 411, 14 Am. Dec. 172.

<sup>3</sup> Belding v. Smythe, 138 Mass. 530; Hadlock v. Brooks, 178 Mass. 425, 59 N. E. 1009; Reece v. Kyle, 49 Ohio St. 475, 31 N. E. 747, 16 L.R.A. 723; Pittsburg, C. C. & St. L. R. Co. v. Volkert, 58 Ohio St. 362, 50 N. E. 924; Lewis v. Broun, 36 W. Va. 1, 14 S. E. 444.

<sup>4</sup> Moses v. Bagley, 55 Ga. 283; Torrence v. Shedd, 112 Ill. 466; Brush v. Carbondale, 229 Ill. 144, 11 Ann. Cas. 121, 82 N. E. 252; Moody v. Harper, 38 Miss. 599; Reece v. Kyle, 49 Ohio St. 475, 31 N. E. 747, 16 L.R.A. 723; Pittsburg, C. C. & St. L. R. Co. v. Volkert, 58 Ohio St. 362, 50 N. E. 924.

The statute *de definitio consp.* (33 Edw. I, stat. 2) declared that: "Champerters be they who move pleas or suits, or cause them to be moved

remuneration from the proceeds of the suit.<sup>5</sup> The gist of the offense consists in the mode of compensation.<sup>6</sup> The corrupting element of the contract is its tendency to foment or protract litigation: its dependency for its value upon the termination of suits; and its introduction, to control and manage them, of parties without other right or interest than such as is derived from the contract.<sup>7</sup>

§ 380. *Barratry Defined.* — Blackstone defines common barratry to be the offense of frequently exciting and stirring up suits and quarrels between his majesty's subjects, either at law or otherwise.<sup>8</sup> This offense is still recognized in some jurisdictions in this country; thus, without defining it, a penalty is provided therefor in Pennsylvania.<sup>9</sup> So, in some jurisdictions, laws of a similar nature have been enacted with a view of preventing the stirring up of a litigation by attorneys.<sup>10</sup> Thus an Illinois statute provides that if any person shall officially intermeddle in any suit at common law or chancery that in nowise belongs to or concerns such person, by maintaining or assisting either party, with money or otherwise, to prosecute or defend such suit with a view to promote litigation, he shall be deemed guilty of maintenance, and upon conviction thereof shall be fined and punished as in cases of common barratry.<sup>11</sup> It has been held that this statute was not violated by a contract on the part of a citizen with a city to pay all costs in

by their own procurement, or by others, and sue at their proper costs, to have part of the land in variance, or part of the gains." 5 Com. Dig., p. 16.

<sup>5</sup> *Torrence v. Shedd*, 112 Ill. 466; *Brush v. Carbondale*, 229 Ill. 144, 11 Ann. Cas. 121, 82 N. E. 252; *Donaldson v. Eaton*, 136 Iowa 650, 114 N. W. 19, 125 Am. St. Rep. 275, 14 L.R.A. (N.S.) 1168; *Hadlock v. Brooks*, 178 Mass. 425, 59 N. E. 1009; *Backus v. Byron*, 4 Mich. 535; *Omaha & R. V. R. Co. v. Brady*, 39 Neb. 27, 57 N. W. 767; *Wallis v. Loubat*, 2 Denio (N. Y.) 607; *In re Bleakley*, 5 Paige (N.

Y.) 311; *Merritt v. Lambert*, 10 Paige (N. Y.) 352; *Pittsburg, C. C. & St. L. R. Co. v. Volkert*, 58 Ohio St. 362, 50 N. E. 924; *Weedon v. Wallace*, Meigs (Tenn.) 286; *Martin v. Veeder*, 20 Wis. 466.

<sup>6</sup> *Sedgwick v. Stanton*, 14 N. Y. 289.

<sup>7</sup> *Price v. Carney*, 75 Ala. 546.

<sup>8</sup> 4 Bl. Com. 134.

<sup>9</sup> Act of March 31, 1860, P. L. 382, § 9, P. & L. Dig. of Laws (1st ed.) p. 1118, § 47.

<sup>10</sup> See *infra*, §§ 395-397.

<sup>11</sup> *Brush v. Carbondale*, 229 Ill. 144, 11 Ann. Cas. 121, 82 N. E. 252.

a suit which the city is prosecuting to test the validity of certain laws, providing the city will carry the suit to a final hearing in the Supreme Court.<sup>12</sup> So, under an old Ohio statute, the encouraging, exciting, and stirring up of any suit, quarrel or controversy, between two or more persons, by certain named officers, including attorneys and counselors at law, with intent to injure such persons, was made an offense punishable by a fine, and liability to the party injured in treble damages.<sup>13</sup> A Wisconsin statute provides that "any person who, for vexation and trouble, shall cause or procure any civil action or proceeding before any court or magistrate to be instituted or carried on in the name of any other person, without the consent of such person or where there is no such person known, shall be punished by imprisonment in the county jail not more than six months, and be liable to pay to any party injured by such civil action or proceeding treble the damages that he may have suffered thereby."<sup>14</sup> A contract between an attorney and one not an attorney that the latter shall, in consideration of part of the fee to be collected, procure the employment of the former by a third person for the prosecution of a suit, is void as against public policy, independent of statutes prohibiting it, though the non-attorney and the third person be relatives.<sup>15</sup>

**§ 381. Maintenance Defined.** — Maintenance is defined to be an officious intermeddling in a suit in which one is not lawfully interested, by maintaining or assisting either party, with money or otherwise, to prosecute or defend it; and it is held to be an offense against public justice, as it keeps alive strife and contention, and perverts the remedial process of the law into an engine of oppression.<sup>16</sup> It has been recently held that an agreement to maintain

<sup>12</sup> *Brush v. Carbondale*, 229 Ill. 144,

11 Ann. Cas. 121, 82 N. E. 252.

<sup>13</sup> *Reece v. Kyle*, 49 Ohio St. 475,

31 N. E. 747, 16 L.R.A. 723.

<sup>14</sup> See § 4469 Wis. Stats. (1898).

<sup>15</sup> *Ford v. Munroe*, (Tex.) 144 S. W. 349.

<sup>16</sup> *Indiana*.—*Quigley v. Thompson*, 53 Ind. 317.

*Massachusetts*. — *Manning v. Sprague*, 148 Mass. 18, 18 N. E. 673, 12 Am. St. Rep. 508, 1 L.R.A. 516.

*Missouri*.—*Breeden v. Frankford Marine Ace. & Plate Glass Ins. Co.*, 220 Mo. 327, 119 S. W. 576.

*New Hampshire*.—*Jordan v. Gillen*, 44 N. H. 424.

*New York*.—*Sedgwick v. Stanton*, 14 N. Y. 289.

an action made for motives of gain is champertous, even though between relations.<sup>17</sup> But a contract whereby children advance to their mother the expenses of her action for damages for the wrongful death of her son, upon her agreement to share equally with them any amount recovered, is not one of champerty or maintenance.<sup>18</sup> By the Roman law, it was a species of the *crimen falsi* to enter into any confederacy, or to do any other act, to support another's lawsuit, by money, witnesses, or patronage.<sup>19</sup> It was conceded, however, that a man might maintain the suit of his near kinsman, servant, or poor neighbor, out of charity and compassion, with impunity.<sup>20</sup> Thus it has been said by a learned jurist that "if a man were to see a poor person in the street, oppressed and abused, and without the means of obtaining redress, and furnished him with money, or employed an attorney to obtain redress for his wrongs, it would require a very strong argument to convince me that that man could be said to be stirring up strife and litigation, and to be guilty of the crime of maintenance."<sup>1</sup>

§ 382. **Terms Distinguished.**—Common barratry, champerty, and maintenance are all offenses of a kindred nature, the evils of which are the promotion of unjust, vexatious, or needless lawsuits, and of a litigious and quarrelsome spirit, and the obstruction and contamination of the fountains and channels of justice, and, as such, they are considered to be crimes against public order, peace, and morality.<sup>2</sup> Champerty differs from maintenance, however, in this: that in the latter the person assisting a suitor is to receive no part of the benefits resulting from the action, while in the former he agrees to assist in the prosecution of the suit, and, as a consideration therefor, to share subsequently in

*Ohio*.—Reece v. Kyle, 49 Ohio St. 475, 31 N. E. 747, 16 L.R.A. 723.

*Tennessee*.—Sherley v. Riggs, 11 Humph. 53.

<sup>17</sup> Taylor v. Perkins, (Mo.) 157 S. W. 122.

<sup>18</sup> Anderson v. Anderson, 12 Ga. App. 706, 78 S. E. 271.

<sup>19</sup> Quigley v. Thompson, 53 Ind. 317.

204 Bl. Com. 134.

<sup>1</sup> Jordan v. Gillen, 44 N. H. 424, following Findon v. Parker, 11 M. & W. (Eng.) 675.

<sup>2</sup> Benedict v. Stuart, 23 Barb. (N. Y.) 420. See also Breeden v. Frankford Marine Acc. & Plate Glass Ins. Co., 220 Mo. 327, 119 S. W. 576.



the possible fruits or proceeds of the litigation;<sup>3</sup> but the gist of the offense is the same in each, the difference being only in the mode of compensation.<sup>4</sup>

*Origin, Purpose, and Adoption of English Laws.*

§ 383. **Origin.** — The origin of prohibitory measures against champerty, barratry, and maintenance, is traceable to the early common law, under which it was held to be an offense against public justice for any man to aid or assist another in litigation. This principle is known to have existed about the close of the eleventh century, when the Norman conqueror, having subjugated the country, and despoiled the natives of their property, divided all the lands in the kingdom into sixty thousand knight's fees, and distributed them among his followers. The principle was well adapted to the occasion. Indeed, it was appropriate during the whole period that the violence and injustice of the feudal system prevailed.<sup>5</sup> Later the common law was adopted and enlarged by acts of Parliament commencing with the statute of Westminster (1 ch. 28), and ending with 32 Henry VIII (ch. 9).<sup>6</sup> It was in 1538 that Henry VIII completed the suppression of the monasteries in England and proceeded to escheat their estates and grant them to his courtiers and parasites. In 1540 he suppressed the order of the Knights of Malta and seized and dispossessed them of

<sup>3</sup> Quigley *v.* Thompson, 53 Ind. 317; Backus *v.* Byron, 4 Mich. 535; Breeden *v.* Frankford Marine Acc. & Plate Glass Ins. Co., 220 Mo. 327, 119 S. W. 576.

<sup>4</sup> Manning *v.* Sprague, 148 Mass. 18, 18 N. E. 673, 12 Am. St. Rep. 508, 1 L.R.A. 516; Breeden *v.* Frankford Marine Acc. & Plate Glass Ins. Co., 220 Mo. 327, 119 S. W. 576.

<sup>5</sup> Lytle *v.* State, 17 Ark. 608. And see the argument of counsel in Key *v.* Vattier, 1 Ohio 132.

<sup>6</sup> Lytle *v.* State, 17 Ark. 608; Sedgwick *v.* Stanton, 14 N. Y. 289.

The terms of the first statute were: Attys. at L. Vol. II.—42.

"No minister of the king shall maintain pleas, suits or matters depending of the king's courts for lands, tenements or other things, for to have part thereof, or other profit by covenant made, and he that doth so, shall be punished at the king's pleasure." 5 Com. Dig. 16, Maintenance.

By 2 Stat. Westm., ch. 49, 13 Edw. I, the chancellor, treasurer, justices, the king's counsel, clerks in chancery and of the exchequer, and other officials named, were forbidden to purchase, or to take by gift, lands or other matter in suit, *pendente lite*. 5 Com. Dig. 18.

their estates and revenues. Here was another urgent occasion for strengthening the arm of violence and wrong in possession, against right and justice dispossessed. And accordingly in this very year (32 Hen. VIII, ch. 9) we find Parliament enacting and confirming the statutes against maintenance and champerty, and declaring it unlawful to purchase any estate unless the vendor or the person under whom he claimed had been in possession within one year preceding the purchase.<sup>7</sup> These statutes had their foundation in the existence of a class of nobles who, by their great power and influence, were able to overawe the courts and pervert the course of justice.<sup>8</sup> Thus one statute recites that "many persons having true title to lands, &c., were wrongfully delayed by means that the defendants did make gifts and feofments of their lands in debate, and of their goods, to great men, against whom the pursuants durst not make their pursuits, &c." <sup>9</sup> From these statutes, and the common law of which they were held to be affirmative, jurists imbibed their ideas of champerty. The courts of justice decided that it was unlawful for a master to pay counsel out of his own money, or to speak at the bar, for his servant. It was even decided to be unlawful for a friend, without compensation, to prosecute the business of a widow in settling her deceased husband's affairs. And these decisions made no distinction whether the aid was afforded in support of right and justice, or in the furtherance of unfounded and vexatious litigation.<sup>10</sup> It is curious to see how the doctrine of maintenance has, from time to time, been received at Westminster Hall. At one time not only he who had laid out money to assist another in his cause, but he who, by his friendship or interest, saved him an expense that he otherwise would be put to, was held to be guilty of maintenance. Everyone who officiously gave evidence was deemed guilty of maintenance, so that he must have had a subpoena or suppressed the truth. That such a doctrine, repugnant to every feeling of the human heart, should be laid aside was to be expected.<sup>11</sup> And the entire doctrine of main-

<sup>7</sup> See argument of counsel in *Key v. Vattier*, 1 Ohio 132.

<sup>8</sup> *Sedgwick v. Stanton*, 14 N. Y. 289.

<sup>9</sup> 1 Richard II. (ch. 9).

<sup>10</sup> See argument of counsel in *Key v. Vattier*, 1 Ohio 132. See also 5 Com. Dig. 16; *Dyer*, 355, B.

<sup>11</sup> *Master v. Miller*, 1 T. R. (Eng.) 340; *Lytle v. State*, 17 Ark. 608;

tenance, for reasons, doubtless, then existing, was carried so far as to render it hazardous for any one, not employed professionally, in any manner to aid or encourage another in the legal vindication of a right. In more modern times, the doctrine of maintenance has, even in England, become essentially modified, and adapted to a better civilization. In the United States, generally, it is regulated by statute; and, where not so regulated, is received with material modifications.<sup>12</sup>

§ 384. Purpose. — The general purpose of the laws against champerty, maintenance, and barratry, is to prevent officious intermeddlers from stirring up strife and contention by vexatious or speculative litigation, which would disturb the peace of society, lead to corrupt practices, and pervert the remedial process of the law.<sup>13</sup> This view is not peculiar to our common law. The Roman law animadverted with equal severity on this class of men and their practices.<sup>14</sup> The old English books abound in denunciations against champerty. Coke calls it the most odious species of maintenance. Blackstone informs us that the practice is greatly abhorred by the law of England, and describes those who engage in it as the pests of civil society, referring at the same time to the severities inflicted upon champertors by the Roman law, in support of his own assertions.<sup>15</sup> Thus, it is said to be unlawful maintenance to assist another with money to carry on his suit, as by retaining counsel for him, or otherwise aiding him in defraying the expense thereof, or by friendship or interest to save such expense when it would otherwise be incurred, or to give any public countenance to another in support of his suit. Such was the general doctrine of maintenance at an early period in the history of the English law, when it was not unusual for men to enter into

*Newkirk v. Cone*, 18 Ill. 449; *Reece v. Kyle*, 49 Ohio St. 475, 31 N. E. 747, 16 L.R.A. 723.

<sup>12</sup> *Newkirk v. Cone*, 18 Ill. 449; *Sedgwick v. Stanton*, 14 N. Y. 289.

<sup>13</sup> *Huber v. Johnson*, 68 Minn. 74, 70 N. W. 806, 64 Am. St. Rep. 456; *Gammons v. Johnson*, 76 Minn. 76, 78 N. W. 1035, *distinguishing* *Gammons*

*v. Johnson*, 69 Minn. 488, 72 N. W. 563; *Dent v. Arthur*, 156 Mo. App. 472, 137 S. W. 285.

<sup>14</sup> See *Huber v. Johnson*, 68 Minn. 74, 70 N. W. 806, 64 Am. St. Rep. 456.

<sup>15</sup> 4 Bl. Com. 135, 136. And see also the argument of counsel in *Key v. Vattier*, 1 Ohio 132.

formal combinations to support each other in lawsuits, and for men of wealth and power to attempt to influence the administration of justice.<sup>16</sup> It is true, as stated in one case, that "champerty presents a strong temptation to engage in it—that of pecuniary profit; one that has a charm which captivates the man of intellect and learning and genius, as well as the more stupid and unlearned, and one which, unfortunately, presents stronger inducements to those of the legal profession than to any others, because they are better qualified to calculate the chances of success, and they can prosecute suits at less actual expense, and, consequently, hazard less in the chances of litigation. Comparatively few of that profession have all the business that they have time to attend to, and if one devotes time which would not otherwise be actually occupied to the prosecution of a doubtful claim, the client paying the ordinary expenses, and he fails to succeed, he is not the poorer for his exertions; whereas, if he succeeds, he is paid not only for his services, but for the risk of their loss. He has a strong temptation too, with the chance of such a bargain before him, to deceive his client, and to represent a title or claim as doubtful, or difficult to be established, when he believes it to be clear and easily established."<sup>17</sup> But it is equally true, as stated by counsel in his argument in another case, that "if we could consider the subject abstracted from the impressions we receive from the early English cases, we would feel none of the abhorrence there spoken of. [Suppose] an individual placed in the power of unfeeling and rapacious men is illegally and oppressively stripped of his property, and turned, with his family, destitute, desolate, and helpless upon the world. A lawyer proposes to investigate his case, to prosecute his claims, and restore him to his rights, at his own risk and charges, and to receive compensation, if any, out of the amount recovered. Is there anything abhorrent to humanity or repugnant to justice in this? It cannot be pretended. The effect is to be produced by reversing the picture, and affixing to the transaction the character deduced from its darkest shades, when abused and applied to the purposes of mischief. An innocent and unoffending man may be vexed and harassed by unfounded and malicious

<sup>16</sup> *Sherley v. Riggs*, 11 Humph. (Tenn.) 53.

<sup>17</sup> *Backus v. Byron*, 4 Mich. 535.

suits, until, in mere weariness and exhaustion, he shall buy his peace. This may be done. And every personal right may be and is abused. That furnishes no reason why its nature and character shall be estimated only by its darkest side, its fair, beneficent, and useful traits of character excluded from sight, and its exercise restrained in regard to the fact that it may be mischievously employed."<sup>18</sup>

### § 385. Adoption of English Laws in United States.—

The English laws against champerty, barratry, and maintenance are said to be in force, as a part of the common law, in some jurisdictions in the United States.<sup>19</sup> And it has been asserted that there is nothing in the common law relating to champerty and maintenance that is not applicable to our condition. "The race of intermeddlers and busybodies is not extinct. It was never confined to Great Britain; and the little band of refugees who landed from the Mayflower on the coast of New England were not entirely free from the vice of intermeddling in the concerns of other people. It is as prevalent a vice in the United States as it ever was in England, and we do not see but that a law restraining intermeddlers from stirring up strife and litigation betwixt their neighbors is wholesome and necessary."<sup>20</sup> So champerty, being an

<sup>18</sup> See argument of counsel in *Key v. Vattier*, 1 Ohio 132. And see *infra*, § 386 and § 421.

<sup>19</sup> *United States*.—*Gregerson v. Im-lay*, 4 Blatchf. 503, 10 Fed. Cas. No. 5,795; *Globe Works v. U. S.* 45 Ct. Cl. 497.

*Indiana*.—*Quigley v. Thompson*, 53 Ind. 317.

*Iowa*.—*Boardman v. Thompson*, 25 Iowa 487.

*Kentucky*.—*Miles v. Collins*, 1 Mete. 308; *Lynn v. Moss*, 62 S. W. 712, 23 Ky. L. Rep. 214.

*Louisiana*.—*Livingston v. Cornell*, 2 Mart. (O. S.) 281; *Mazurean v. Morgan*, 25 La. Ann. 281.

*Missouri*.—*Breeden v. Frankford*

*Marine Accident, etc., Ins. Co.*, 220 Mo. 327, 119 S. W. 576; *Dent v. Arthur*, 156 Mo. App. 472, 137 S. W. 285.

*Ohio*.—*Weakly v. Hall*, 13 Ohio 167, 42 Am. Dec. 194; *Reece v. Kyle*, 49 Ohio St. 475, 31 N. E. 747, 16 L.R.A. 723.

*Virginia*.—*Roller v. Murray*, 107 Va. 527, 59 S. E. 421.

*Wisconsin*.—*Allard v. Lamirande*, 29 Wis. 502.

<sup>20</sup> *Duke v. Harper*, 66 Mo. 51, 27 Am. Rep. 314; *Breeden v. Frankford Marine Accident, etc., Ins. Co.*, 220 Mo. 327, 119 S. W. 576; *Dahms v. Sears*, 13 Ore. 47, 11 Pac. 891.

offense at common law, is to be presumed to be against the law of another state unless the contrary appears.<sup>1</sup> With us, however, such laws are administered in a very different spirit from that which seems to have prevailed in England; thus while the essential principles of the common law are recognized, their enforcement here is confined to those cases wherein it appears that one is actually engaged in stirring up vexatious litigation and strife.<sup>2</sup> The law of the state wherein an alleged champertous suit is brought will govern in determining whether or not champerty exists.<sup>3</sup> These laws, however, were never favored in this country,<sup>4</sup> and in most jurisdictions they have either given way to statutes, or have been disregarded as unsuited to the conditions prevailing here.<sup>5</sup> There

<sup>1</sup> *Thurston v. Percival*, 1 Pick. (Mass.) 415.

<sup>2</sup> *Illinois*.—*McGoan v. Ankeny*, 11 Ill. 558; *Gilbert v. Holmes*, 64 Ill. 548; *Thompson v. Reynolds*, 73 Ill. 11, *overruling* *Newkirk v. Cone*, 18 Ill. 449; *Geer v. Frank*, 179 Ill. 570, 53 N. E. 965, 45 L.R.A. 110, *affirming* 79 Ill. App. 195.

*Michigan*.—*Backus v. Byron*, 4 Mich. 535.

*Minnesota*.—*Huber v. Johnson*, 68 Minn. 74, 70 N. W. 806, 64 Am. St. Rep. 456; *Gammons v. Johnson*, 76 Minn. 76, 78 N. W. 1035, *distinguishing* *Gammons v. Johnson*, 69 Minn. 488, 72 N. W. 563.

*Missouri*.—*Dent v. Arthur*, 156 Mo. App. 472, 137 S. W. 285.

*New Hampshire*.—*Christie v. Sawyer*, 44 N. H. 298.

*Oregon*.—*Dahms v. Sears*, 13 Ore. 47, 11 Pac. 891.

<sup>3</sup> *Roller v. Murray*, 107 Va. 527, 59 S. E. 421.

<sup>4</sup> *United States*.—*Roberts v. Cooper*, 20 How. 467, 15 U. S. (L. ed.) 969.

*Illinois*.—*Dunne v. Herrick*, 37 Ill. App. 180.

*Massachusetts*.—*Thurston v. Percival*, 1 Pick. 417.

*Missouri*.—*Dent v. Arthur*, 156 Mo. App. 472, 137 S. W. 285.

*Pennsylvania*.—*Foster v. Jack*, 4 Watts 334.

*Ohio*.—*Reece v. Kyle*, 49 Ohio St. 475, 31 N. E. 747, 16 L.R.A. 723.

*Tennessee*.—*Newnan v. Washington*, Mart. & Y. 79.

<sup>5</sup> *United States*.—*Peek v. Heurich*, 167 U. S. 624, 17 S. Ct. 927, 42 U. S. (L. ed.) 302. See *Courtright v. Burnes*, 13 Fed. 317.

*Connecticut*.—*Richardson v. Rowland*, 40 Conn. 565.

*Georgia*.—*Ellis v. Smith*, 112 Ga. 480, 37 S. E. 739.

*Idaho*.—*Merchants' Protective Ass'n v. Jacobsen*, 22 Idaho 636, 127 Pac. 315.

*Illinois*.—*Newkirk v. Cone*, 13 Ill. 449; *Brush v. Carbondale*, 229 Ill. 144, 11 Ann. Cas. 121, 82 N. E. 252.

*Kentucky*.—*Davis v. Sharron*, 15 B. Mon. 64; *Roberts v. Yancey*, 94 Ky. 243, 21 S. W. 1047, 42 Am. St. Rep. 357, 15 Ky. L. Rep. 10, 14 Ky. L. Rep. 42; *Wehmhoff v. Rutherford*, 98 Ky. 91, 32 S. W. 288.

*Massachusetts*.—*Allen v. Hawks*, 13 Pick. 79; *Scott v. Harmon*, 109 Mass. 237, 12 Am. Rep. 685; *Manning v.*

are such broad distinctions in the state of society between Great Britain and this country, that the reasons which make a law against maintenance and champerty salutary or necessary there, do not exist here.<sup>6</sup> And in this connection may be noticed a distinction between the English system of administering justice and our own touching attorneys and counselors and their compensation, which is an important ingredient in considering the question of champerty. Under the English law there is a total incapacity in counsel to make any contract whatever with his client on account of his professional services, much less a contract for a share of the thing in suit, although he was permitted to accept a fee as a gratuity. And the same is true of the attorney, who can make no other contract with his client than that which the law had already made for him in assigning to every service its fixed and appropriate compensation.<sup>7</sup> It would not be wise to carry rules adopted originally for the purpose of preventing the powerful from oppressing the weak by groundless suits in the courts, to the extent of hindering the weak in efforts to avail themselves of lawful remedies against the powerful, now that the conditions making the ancient rules necessary have substantially disappeared, and new conditions have arisen by reason of which it has become the interest of the powerful to embarrass and hinder the dependent and weak

Sprague, 148 Mass. 18, 18 N. E. 673.  
12 Am. St. Rep. 508, 1 L.R.A. 516.

*Michigan*.—Backus v. Byron, 4 Mich. 535; Wildey v. Crane, 63 Mich. 720, 30 N. W. 327; Foley v. Grand Rapids, etc., R. Co., 157 Mich. 67, 121 N. W. 257, 16 Detroit Leg. N. 246.

*New Jersey*.—Schomp v. Schenck, 40 N. J. L. 195, 29 Am. Rep. 219.

*New York*.—Sedgwick v. Stanton, 14 N. Y. 289; Browne v. West, 9 App. Div. 135, 41 N. Y. S. 146; Zogbaum v. Parker, 66 Barb. 341, affirmed 55 N. Y. 120. And see Clark v. Grosh, 81 Misc. 407, 142 N. Y. S. 966.

*Ohio*.—Reece v. Kyle, 49 Ohio St. 475, 31 N. E. 747, 16 L.R.A. 723.

*Oregon*.—Brown v. Bigne, 21 Ore.

260, 28 Pac. 11, 28 Am. St. Rep. 752, 14 L.R.A. 745.

*Tennessee*.—Benton v. Henry, 2 Cold. 83; Sherley v. Riggs, 11 Humph. 53; Moore v. Campbell Academy, 9 Yerg. 115.

*Texas*.—Bentinck v. Franklin, 38 Tex. 458; Wheeler v. Riviere, 49 S. W. 697.

*Washington*.—Smits v. Hogan, 35 Wash. 290, 1 Ann. Cas. 297, 77 Pac. 390. See also the cases cited throughout this section; and see the local laws.

<sup>6</sup> Davis v. Webber, 66 Ark. 190, 49 S. W. 822, 74 Am. St. Rep. 81, 45 L.R.A. 196; Richardson v. Rowland, 40 Conn. 565.

<sup>7</sup> Lytle v. State, 17 Ark. 608.

from obtaining speedy justice in the courts.<sup>8</sup> Nor would it be judicious to extend arbitrarily those rules which say that a given contract is against public policy, for men of full age and competent understanding ought to have the utmost liberty of contracting; and their contracts, when entered into fully and voluntarily, should be enforced by the courts, for it is a paramount public policy that courts should not lightly interfere with the freedom of contract.<sup>9</sup>

*As Affecting Contracts for Compensation.*

§ 386. **Contingent Fees.**—It is doubtless the more modern doctrine that the mere taking a case on a contingent fee does not constitute champerty; and that it is not unlawful for an attorney to carry on a suit for another for a share of what may be recovered, at least unless he assumes the risks of litigation by indemnifying his client against costs and expenses.<sup>10</sup> In such cases the attorney has no interest in the litigation excepting to the extent of his legal services, and if the contract is not un-

<sup>8</sup> *Reece v. Kyle*, 49 Ohio St. 475, 31 N. E. 747, 16 L.R.A. 723.

<sup>9</sup> *Lytle v. State*, 17 Ark. 608; *Reece v. Kyle*, 49 Ohio St. 475, 31 N. E. 747, 16 L.R.A. 723.

<sup>10</sup> *United States*.—*Northwestern S. S. Co. v. Cochran*, 191 Fed. 146, 111 C. C. A. 626.

*Arkansas*.—*Davis v. Weber*, 66 Ark. 190, 49 S. W. 822, 74 Am. St. Rep. 81, 45 L.R.A. 196.

*District of Columbia*.—*Stanton v. Haskin*, 1 MacArthur 558, 29 Am. Rep. 612.

*Illinois*.—*Dunne v. Herrick*, 37 Ill. App. 180.

*Indiana*.—*Tron v. Lewis*, 31 Ind. App. 178, 66 N. E. 490.

*Iowa*.—*McDonald v. Chicago, etc.*, R. Co., 29 Iowa 170; *Winslow v. Central Iowa R. Co.*, 71 Iowa 197, 32 N. W. 330; *Rickel v. Chicago, R. I. & P. R. Co.*, 112 Iowa 148, 83 N. W. 957; *Wallace v. Chicago, M. & St.*

*P. R. Co.*, 112 Iowa 565, 84 N. W. 662; *Barthell v. Chicago, M. & St. P. R. Co.*, 138 Iowa 688, 116 N. W. 813.

*Kentucky*.—*Newport Rolling Mill Co. v. Hall*, 147 Ky. 598, 144 S. W. 760.

*Louisiana*.—*Clay v. Ballard*, 9 Rob. 308, 41 Am. Dec. 328; *La Societe, etc., v. Morris*, Man. Unrep. Cas. 1.

*Michigan*.—*Willey v. Crane*, 63 Mich. 720, 30 N. W. 327.

*Minnesota*.—*Canty v. Latterner*, 31 Minn. 239, 17 N. W. 385; *Gammons v. Johnson*, 76 Minn. 76, 78 N. W. 1035, *distinguishing* *Gammons v. Johnson*, 69 Minn. 488, 72 N. W. 563.

*Missouri*.—*Johnson v. United R. Co.*, 247 Mo. 326, 152 S. W. 362, 374; *Taylor v. Perkins*, 157 S. W. 122.

*New Hampshire*.—*Shapley v. Bel- lows*, 4 N. H. 355; *Christie v. Sawyer*, 44 N. H. 298.

*New York*.—*Marsh v. Holbrook*, 3



conscionable or unreasonable in its terms it will be enforced.<sup>11</sup> And the fact that the attorney takes an assignment of a part of the cause of action to secure his fee does not make the contract champertous.<sup>12</sup> The suitor may be unable to pay in advance, and without credit, or he may deem such an arrangement most prudent and best calculated to insure vigilance on the part of his counsel; and if he has a cause of action the courts are and should be open for its legal prosecution.<sup>13</sup> The fact that the practice of stipulating beforehand for professional fees, contingent on the result of the litigation, is sometimes abused, and exposes the profession to misapprehension and illiberal remark, is not a sufficient excuse for refusing to enforce such a contract, when characterized throughout by "all good fidelity" to the client.<sup>14</sup> In some states, however, it seems that contracts for contingent fees are deemed to be champertous where the agreement is to pay the attorney an exorbitant sum in the event of recovery.<sup>15</sup> It is, of course, the duty of the courts carefully to scrutinize such contracts to see that no improper advantage is taken either of the ignorance or necessity of those who enter into them; and if it appears that they are obtained by any undue influence of the attorney over the client,

Abb. App. Dec. 176; *Fitch v. Gardener*, 2 Keyes 516; *Fowler v. Callan*, 102 N. Y. 395, 7 N. E. 169, *reversing* 4 Civ. Proc. 413, 12 Daly 263.

*Ohio*.—*Spencer v. King*, 5 Ohio 182; *State v. Ampt*, 6 Ohio Dec. (Reprint) 699, 7 Am. L. Rec. 469.

*Pennsylvania*.—*Williams v. Philadelphia*, 208 Pa. St. 282, 57 Atl. 578.

*Texas*.—*Stewart v. Houston & T. C. R. Co.*, 62 Tex. 246.

*Utah*.—*Croco v. Oregon Short Line R. Co.*, 18 Utah 311, 54 Pac. 985, 44 L.R.A. 285.

*Vermont*.—*In re Aldrich*, 86 Atl. 801.

*Virginia*.—*Nichels v. Kane*, 82 Va. 309.

*Washington*.—*Smits v. Hogan*, 35 Wash. 290, 1 Ann. Cas. 297, 77 Pac. 390.

*West Virginia*.—*Lewis v. Broun*, 36 W. Va. 1, 14 S. E. 444.

*Wisconsin*.—*Ryan v. Martin*, 16 Wis. 57; *Allard v. Lamirande*, 29 Wis. 502; *Gilchrist v. Brande*, 58 Wis. 184, 15 N. W. 817; *Dockery v. McLellan*, 93 Wis. 381, 67 N. W. 733.

<sup>11</sup> *Newkirk v. Cone*, 18 Ill. 449; *Geer v. Frank*, 179 Ill. 570, 53 N. E. 965, 45 L.R.A. 110.

<sup>12</sup> *In re Aldrich*, (Vt.) 86 Atl. 801.

<sup>13</sup> *Newkirk v. Cone*, 18 Ill. 449; *Whinery v. Brown*, 36 Ind. App. 276, 75 N. E. 605.

<sup>14</sup> *Whinery v. Brown*, 36 Ind. App. 276, 75 N. E. 605.

<sup>15</sup> *Rutler v. Legro*, 62 N. H. 350, 13 Am. St. Rep. 573; *Cross v. Bloomer*, 6 Baxt. (Tenn.) 74.

or by fraud or imposition, or that the compensation is clearly excessive, the party aggrieved will be protected;<sup>16</sup> but the mere fact that a larger fee is provided for when contingent on success than would be either asked or paid were the payment made in advance, is no good reason for declaring the whole contract void.<sup>17</sup> The subject of contingent fees generally will be considered hereafter in connection with contracts for compensation.<sup>18</sup>

**§ 387. In Suits to Recover Land.** — At common law, and under ancient statutes in aid thereof, the sale and purchase of titles where the vendor was not in possession, and of doubtful and disputed titles, with the view to carrying on suits for maintaining them, whether the vendor was in or out of possession, or whether the title was good or bad, were prohibited under severe penalties. So, also, the maintaining and carrying on of suits upon agreements to have a part of the land, or right to be recovered, or anything produced therefrom, were unlawful, and punished as offenses.<sup>19</sup> The objection to this method of compensating an attorney, by agreeing to give him a part of the thing in litigation, has also been recognized in this country.<sup>20</sup> Thus it has been said that an agreement by an attorney at law to prosecute at his own expense a suit to recover land, in which he personally has and claims no title or interest either present or contingent, in consideration of receiving a certain proportion of what he may recover, is contrary to public policy as tending to stir up baseless litigation.<sup>1</sup>

<sup>16</sup> *Whinery v. Brown*, 36 Ind. App. 276, 75 N. E. 605.

<sup>17</sup> See *infra*, § 394.

<sup>18</sup> See *infra*, §§ 421-427.

<sup>19</sup> Bacon's Abr. title "Maintenance," A. and D.; 3 Thomas Coke, book 3, chap. 12; 1 Hawkins Pl. book 1, chap. 27. See also *Newkirk v. Cone*, 18 Ill. 119.

<sup>20</sup> See *supra*, § 385.

*Wisconsin*. — Section 4438 Wis. Stats. (1898) provides that "any officer, judicial or ministerial, or any other person who shall take any con-

veyance of any lands or tenements or of any interest therein, and who is not in the lawful possession thereof at the time, from any person not being in the possession thereof, while such lands or tenements shall be the subject of controversy by action in court, knowing the pendency of such action and that the grantor was not in the possession of such lands or tenements, shall be punished by imprisonment in the county jail not more than one year or by fine not exceeding two hundred dollars."

<sup>1</sup> *Peck v. Heinrich*, 167 U. S. 624,

In many parts of the United States, however, the ancient English statutes of champerty and maintenance have either never been adopted, or have become obsolete;<sup>2</sup> and agreements whereby an attorney is to receive a part of the land in controversy, as compensation for his services in connection with the recovery thereof, have been held to be valid<sup>3</sup> on the same grounds that agreements for contingent fees in other cases have been sustained.<sup>4</sup>

**§ 388. Contracting for Part of Recovery Distinguished from Creating Indebtedness for Fees.**—In some jurisdictions a contract for an attorney's compensation will be deemed champertous where it provides that payment is not only to be contingent on success, but also that such payment is to be a part of the amount recovered by him for the client.<sup>5</sup> Agreements of this nature may, on the application of the client, be set aside in equity.<sup>6</sup> But it is also held, even in the states wherein this principle is maintained, that a contract for an attorney's compensation may be valid notwithstanding that it is, in effect, contingent on the success of the litigation, providing that the agreement creates an indebtedness on the part of the client for which the attorney would have a cause of action against him,<sup>7</sup> or, possibly,

17 S. Ct. 927, 42 U. S. (L. ed.) 302; *Jenkins v. Bradford*, 59 Ala. 400.

<sup>2</sup> See *supra*, § 385. See also *Peck v. Heurich*, 167 U. S. 624, 17 S. Ct. 927, 42 U. S. (L. ed.) 302.

<sup>3</sup> *McPherson v. Cox*, 96 U. S. 404, 24 U. S. (L. ed.) 746; *Newkirk v. Cone*, 18 Ill. 449; *Willite v. Roberts*, 4 Dana (Ky.) 172; *Ramsey v. Trent*, 10 B. Mon. (Ky.) 336; *Shelton v. Franklin*, 224 Mo. 342, 123 S. W. 1084, 135 Am. St. Rep. 537. See also *Chester v. Jumel*, 125 N. Y. 237, 26 N. E. 297.

<sup>4</sup> See *supra*, § 386.

<sup>5</sup> *Alabama*.—*Dumas v. Smith*, 17 Ala. 305.

*Kentucky*.—*Roberts v. Yancey*, 94 Ky. 243, 21 S. W. 1047, 42 Am. St. Rep. 357, 15 Ky. L. Rep. 10, 14 Ky.

L. Rep. 42; *Leonard v. Boyd*, 71 S. W. 508, 24 Ky. L. Rep. 1320.

*Massachusetts*.—*Aekert v. Barker*, 131 Mass. 436; *Belding v. Smythe*, 138 Mass. 530; *Gargano v. Pope*, 184 Mass. 571, 69 N. E. 343, 100 Am. St. Rep. 575.

*Minnesota*.—*Huber v. Johnson*, 68 Minn. 74, 70 N. W. 806, 64 Am. St. Rep. 456.

<sup>6</sup> *Belding v. Smythe*, 138 Mass. 530; *Gargano v. Pope*, 184 Mass. 571, 69 N. E. 343, 100 Am. St. Rep. 575.

<sup>7</sup> *Alabama*.—*Ware v. Russell*, 70 Ala. 174, 45 Am. Rep. 82. See *Priece v. Carney*, 75 Ala. 546.

*Maryland*.—*Wheeler v. Harrison*, 94 Md. 147, 50 Atl. 523.

*Massachusetts*.—*Blaisdell v. Abern*, 144 Mass. 393, 11 N. E. 681, 59 Am.

does not provide that such indebtedness shall not exist.<sup>8</sup> Thus the contingency of the fee necessary to constitute champerty is made dependent upon the terms of the contract, not on the inability of the party to pay unless successful in the suit.<sup>9</sup> It is immaterial that the avails of the suit, or a part of them, are pledged as security, or that such avails are the means and the security on which the attorney relies for payment.<sup>10</sup> Nor is it material that the amount of the compensation is to be measured by the amount of the recovery, as, for instance, a certain percentage thereof.<sup>11</sup> Some light may be thrown on the view of contingent fees as champer-

Rep. 99; *Hadlock v. Brooks*, 178 Mass. 425, 59 N. E. 1009.

In *Phillips v. Louisville & N. R. Co.*, 153 Fed. 795, in speaking of agreements of this character, it was said: "It is insisted that the written contract between counsel and the plaintiff in this cause in reference to the payment of their fees, which written contract is made a part of petition, shows upon its face that the fee provided therein is not in fact a contingent fee, but merely a contract setting forth the basis upon which the amount of the fee to be paid is to be determined, and it is insisted that therefore the security of costs should not be required of the plaintiff. . . . It will be noted that the agreement stating the payment of the fee is in the following words: 'I hereby agree to pay him in full settlement of his fee an amount of money equal to one-third of any amount recovered by him in said cause by settlement or otherwise.' Now, does the mere statement in writing that the fee to be paid is an amount of money equal to one-third of any amount recovered change in fact the contingent nature of the contract? Clearly not. To hold otherwise would be but a mere juggle of

words. It will be noted in the written contract that there is no provision whatever for the payment of the fee in case nothing is recovered of the defendant in the suit. The plaintiff is admitted to be a pauper and unable to pay any fee in any event, save alone in the happening of the event of his recovery in this suit. Then from what source is the fee to be recovered? The conclusion is inevitable, from the amount of the recovery alone. Again, the basis of the fee charged is not gauged, nor attempted to be gauged, by the amount of skill, time, or trouble required of counsel in the case, but is gauged and fixed alone upon the basis of the amount of recovery."

<sup>8</sup> *Hadlock v. Brooks*, 178 Mass. 425, 59 N. E. 1009.

<sup>9</sup> *Moore v. Campbell Academy*, 9 Yerg. (Tenn.) 115. See also *Lyttle v. Goldberg*, 131 Wis. 613, 111 N. W. 718.

<sup>10</sup> *Walker v. Cuthbert*, 10 Ala. 213; *Tapley v. Coffin*, 12 Gray (Mass.) 420; *Blaisdell v. Ahern*, 144 Mass. 393, 11 N. E. 681, 59 Am. Rep. 99; *Hadlock v. Brooks*, 178 Mass. 425, 59 N. E. 1009; *Christie v. Sawyer*, 44 N. H. 298.

<sup>11</sup> *Kentucky*.—*Evans v. Bell*, 6 Dana

tous taken by the cases considered in this section by the following quotation: "What is the meaning of a champertous contract? It is this: If, in the assumed case of you going to a lawyer to hire him to take a certain case, you said to him: 'I haven't any money, and unless I win this case I shan't have any money to pay you. Will you take this case, charge me either a certain percentage, or such amount as you think best, if you win the case, and, if you lose the case, charge me nothing?'—that is a champertous contract; that is an illegal contract and is a void contract. There are contracts that look a great deal like it upon the face of it that are not void; that is, are not champertous. It is competent for the parties to say, 'I have no money and I can't pay you until I get the verdict.' If they stop there—if they simply make it a question of the time of payment—it is perfectly competent. It is perfectly competent for the client to say, and the lawyer to agree to it, 'I will pay you, if you are successful, a quarter of what you recover;' if they don't add the further condition, 'nothing if you don't recover.' Or, in other words, to put it in brief, if they make the payment of any fee at all contingent on the success, that is a champertous contract."<sup>12</sup>

**§ 389. Agreement to Pay Costs or Expenses.** — As stated heretofore,<sup>13</sup> the payment of the costs or expenses of litigation is usually considered an essential element of champertous agreements;<sup>14</sup> under some statutes, however, a contract may be cham-

479; *Ramsey v. Trent*, 10 B. Mon. 336; *Cumberland, etc., R. Co. v. Harrison*, 1 Ky. L. Rep. 411.

*Missouri*.—*Taylor v. St. Louis Transit Co.*, 198 Mo. 715, 97 S. W. 155.

*New York*.—*In re Fitzsimons*, 174 N. Y. 15, 66 N. E. 554, reversing 77 App. Div. 345, 12 N. Y. Ann. Cas. 250, 79 N. Y. S. 194.

*Tennessee*.—*Moore v. Campbell Academy*, 9 Yerg. 115.

<sup>12</sup> *Hadlock v. Brooks*, 178 Mass. 425, 59 N. E. 1009.

<sup>13</sup> See *supra*, § 379.

<sup>14</sup> *Illinois*.—*West Chicago Park Com'rs. v. Coleman*, 108 Ill. 591; *Calkins v. Pease*, 125 Ill. App. 270.

*Iowa*.—*Jewel v. Neidy*, 61 Iowa 299, 16 N. W. 141.

*Kansas*.—*Aultman v. Waddle*, 40 Kan. 195, 19 Pac. 730.

*Massachusetts*.—*Scott v. Harmon*, 109 Mass. 237, 12 Am. Rep. 685.

*Mississippi*.—*Moody v. Harper*, 38 Miss. 599.

*Missouri*.—*Duke v. Harper*, 2 Mo. App. 1, affirmed 66 Mo. 51, 27 Am. Rep. 314; *Ball v. Royal Ins. Co.*, 129 Mo. App. 34, 107 S. W. 1097.

pertous even though there is no obligation on the part of the attorney to pay costs or expenses.<sup>15</sup>

As a general rule an agreement under which an attorney contracts to conduct litigation at his own cost and expense, in consideration of all or a part of the recovery, is champertous,<sup>16</sup> how-

*Nebraska*.—*Omaha & R. V. R. Co. v. Brady*, 39 Neb. 27, 57 N. W. 767.

*West Virginia*.—*Anderson v. Caraway*, 27 W. Va. 385.

*Wisconsin*.—*Sparling v. U. S. Sugar Co.*, 136 Wis. 509, 117 N. W. 1055.

<sup>15</sup> *Gregerson v. Imlay*, 4 Blatchf. 503, 10 Fed. Cas. No. 5,795; *Ackert v. Barker*, 131 Mass. 436. See also *supra*, § 388.

<sup>16</sup> *England*.—*Hilton v. Woods*, L. R. 4 Eq. 432, 36 L. J. Ch. 491, 16 L. T. N. S. 736, 15 W. R. 1105; *In re Masters*, 4 Dowl. 18, 1 Hurl. & W. 348; *Strange v. Brennan*, 15 Sim. 346, *affirmed* 2 Coop. t. Cot. 1, 15 L. J. Ch. 389, 10 Jur. 649; *Earle v. Hopwood*, 9 C. B. N. S. 566, 99 E. C. L. 566, 30 L. J. C. Pl. 217, 7 Jur. N. S. 775, 3 L. T. N. S. 670, 9 W. R. 272.

*Canada*.—*Colville v. Small*, 22 Ont. L. Rep. 426, 19 Ann. Cas. 515; *O'Connor v. Gemmill*, 26 Ont. App. 27.

*United States*.—*Peck v. Heinrich*, 167 U. S. 624, 17 S. Ct. 927, 42 U. S. (L. ed.) 302; *Globe Works v. U. S.*, 45 Ct. Cl. 497.

*Colorado*.—See *O'Driscoll v. Doyle*, 31 Colo. 193, 73 Pac. 27.

*District of Columbia*.—*Johnsen v. Van Wyck*, 4 App. Cas. 294.

*Georgia*.—*Taylor v. Hinton*, 66 Ga. 743.

*Illinois*.—*Geer v. Frank*, 179 Ill. 570, 53 N. E. 965, 45 L.R.A. 110, *affirming* 79 Ill. App. 195; *Granat v. Kruse*, 114 Ill. App. 488, *dismissed* 213 Ill. 328, 72 N. E. 744. See also

*Phillips v. South Park Com'rs.*, 119 Ill. 626, 10 N. E. 230.

*Indiana*.—*Quigley v. Thompson*, 53 Ind. 317.

*Iowa*.—*Barngrover v. Pettigrew*, 128 Iowa 533, 104 N. W. 904, 111 Am. St. Rep. 206, 2 L.R.A.(N.S.) 260.

*Kansas*.—*Atchison, T. & S. F. R. Co. v. Johnson*, 29 Kan. 218; *Moreland v. Devenney*, 72 Kan. 471, 83 Pac. 1097.

*Massachusetts*.—*Laney v. Havender*, 146 Mass. 615, 16 N. E. 464; *Hadlock v. Brooks*, 178 Mass. 425, 59 N. E. 1009.

*Minnesota*.—*Huber v. Johnson*, 68 Minn. 74, 70 N. W. 806, 64 Am. St. Rep. 456.

*Missouri*.—*Comstock v. Flower*, 109 Mo. App. 275, 84 S. W. 207; *Taylor v. Perkins*, 157 S. W. 122.

*New York*.—*Coughlin v. New York Cent., etc., R. Co.*, 71 N. Y. 443, 27 Am. Rep. 75; *McCoy v. Gas Engine & Power Co.*, 152 App. Div. 642, 137 N. Y. S. 591; *Taylor v. Enthoven*, 88 N. Y. S. 138.

*Ohio*.—*Reece v. Kyle*, 49 Ohio St. 475, 31 N. E. 747, 16 L.R.A. 723; *Brown v. Ginn*, 66 Ohio St. 316, 64 N. E. 123; *Emslie v. Ford Plate Glass Co.*, 25 Ohio Cir. Ct. Rep. 548.

*Rhode Island*.—*Martin v. Clarke*, 8 R. I. 389, 5 Am. Rep. 586.

*Tennessee*.—M. & V. Code, § 2450; *Hayney v. Coyne*, 10 Heisk. 339; *Weedon v. Wallace*, Meigs 286.

*Utah*.—*Croco v. Oregon Short Line*

ever honestly entered into and carried out,<sup>17</sup> and it will not be enforced either at law or in equity.<sup>18</sup> So, an agreement by which the attorney indemnifies the client against costs, is no less champertous than one in which it is affirmatively provided that counsel shall pay the costs.<sup>19</sup>

On the other hand, many authorities recognize the fact that there are some necessary and proper expenses which an attorney may agree to pay in connection with the prosecution of a lawsuit.<sup>20</sup> Indeed, it is not uncommon for attorneys, in commencing actions for poor people, to advance the money necessary for the prosecution of the suit upon the credit of the cause, thus enabling those in indigent circumstances to obtain justice;<sup>1</sup> to denounce this practice as improper would be to condemn the daily acts of many

R. Co., 18 Utah 311, 54 Pac. 985, 44 L.R.A. 285; *Nelson v. Evans*, 21 Utah 202, 60 Pac. 557; *In re Evans*, 22 Utah 366, 62 Pac. 913, 83 Am. St. Rep. 794, 53 L.R.A. 952.

*Vermont*.—See *Hamilton v. Gray*, 67 Vt. 233, 31 Atl. 315, 48 Am. St. Rep. 811.

*Virginia*.—*Nickels v. Kane*, 82 Va. 309; *Roller v. Murray*, 112 Va. 780, Ann. Cas. 1913B 1088, 72 S. E. 665, 38 L.R.A.(N.S.) 1202.

*Wisconsin*.—*Stearns v. Felker*, 28 Wis. 594; *Kelly v. Kelly*, 86 Wis. 170, 56 N. W. 637.

<sup>17</sup> *Thompson v. Reynolds*, 73 Ill. 11.

<sup>18</sup> *Geer v. Frank*, 179 Ill. 570, 53 N. E. 965, 45 L.R.A. 110, *affirming* 79 Ill. App. 195.

<sup>19</sup> *Roller v. Murray*, 107 Va. 527, 59 S. E. 421.

But see *Shelton v. Franklin*, 224 Mo. 342, 123 S. W. 1084, 135 Am. St. Rep. 537, wherein it was held that a contract of employment, authorizing an attorney to recover certain land for the plaintiff, and agreeing to pay him for his "services one half of the land recovered," with nothing said or

understood as to paying costs, is not champertous although the attorney testified that, knowing plaintiff to be good for the costs, he made the cost bond. See also *Grace v. Floyd*, (Miss.) 61 So. 694, in which a contract between attorney and client by which, in addition to half of a recovery, he was to receive the interest on the judgment and statutory damages on his agreement to pay all costs of an appeal in case the judgment was reversed, was held not contrary to public policy.

<sup>20</sup> *Kelerher v. Henderson*, 203 Mo. 498, 101 S. W. 1083; *Shuck v. Pfeninghausen*, 101 Mo. App. 697, 74 S. W. 381.

<sup>1</sup> *Shapley v. Bellows*, 4 N. H. 355; *Christie v. Sawyer*, 44 N. H. 298; *Jordan v. Gillen*, 44 N. H. 424; *Wallace v. Chicago, M. & St. P. R. Co.*, 112 Iowa 565, 84 N. W. 662; *In re Fitzsimmons*, 174 N. Y. 15, 66 N. E. 554, *reversing* 77 App. Div. 345, 12 N. Y. Ann. Cas. 250, 79 N. Y. S. 194; *In re Evans*, (Utah) 130 Pac. 217; *Smits v. Hogan*, 35 Wash. 290, 1 Ann. Cas. 297, 77 Pac. 390.

honorable members of the profession.<sup>2</sup> Thus it has been held that it is not against public policy for an attorney to loan his client the money with which to pay the costs of suit, nor to advance the money necessary to carry it on, as needed, when such advances are made as a loan with an express agreement or understanding for its repayment.<sup>3</sup> A contract between attorney and client by which, in addition to half of a recovery, he was to receive the interest on the judgment and statutory damages on his agreement to pay all costs of an appeal in case the judgment was reversed, has been held not contrary to public policy.<sup>4</sup>

### § 390. Contracts Forbidding Settlement by Client.—

In several jurisdictions contracts between attorney and client which, in addition to providing for the attorney's compensation, stipulate that the client cannot settle the litigation without the consent of the attorney, have been held to be champertous<sup>5</sup> and voidable at the option of the client.<sup>6</sup> The reason assigned for this rule is based on the theory that the interest of society in maintaining peace demands the speedy settlement of controversies and advocates the amicable adjustment thereof; and as the desired harmony would not be promoted by denying to a party the right to dismiss a suit or action without the consent of his attorney, an agreement by the terms of which a client attempts to waive such right is violative of public policy, and therefore unenforceable.<sup>7</sup>

<sup>2</sup> *Reece v. Kyle*, 49 Ohio St. 475, 31 N. E. 747, 16 L.R.A. 723.

<sup>3</sup> *The J. Carl Jackson*, 29 Fed. 396; *Christie v. Sawyer*, 44 N. H. 298; *Taylor v. Perkins*, (Mo.) 157 S. W. 122; *Potter v. Ajax Min. Co.*, 22 Utah 273, 61 Pac. 999. And see *Reece v. Kyle*, 49 Ohio St. 475, 31 N. E. 747, 16 L.R.A. 723.

<sup>4</sup> *Grave v. Floyd*, (Miss.) 61 So. 694.

<sup>5</sup> *Kauffman v. Phillips*, 154 Ia. 512, 134 N. W. 575; *Newport Rolling Mill Co. v. Hall*, 147 Ky. 598, 111 S. W. 760; *Key v. Vattier*, 1 Ohio 132; *Brown v. Ginn*, 66 Ohio St. 316, 61 N.

E. 123; *Emslie v. Ford Plate Glass Co.*, 25 Ohio Cir. Ct. Rep. 548; *Roller v. Murray*, 107 Va. 527, 59 S. E. 421. Compare *Ryan v. Martin*, 16 Wis. 57.

<sup>6</sup> *Davy v. Fidelity & Casualty Ins. Co.*, 78 Ohio St. 256, 85 N. E. 504, 125 Am. St. Rep. 694, 17 L.R.A. (N.S.) 443, following *Key v. Vattier*, 1 Ohio 132; *Weakly v. Hall*, 13 Ohio 167, 42 Am. Dec. 194; *Lewis v. Lewis*, 15 Ohio 715; *Brown v. Ginn*, 66 Ohio St. 316, 64 N. E. 123.

<sup>7</sup> *Jackson v. Stearns*, 48 Ore. 25, 84 Pac. 798, 5 L.R.A. (N.S.) 390.



This subject will also be considered in connection with contracts for compensation.<sup>8</sup>

### § 391. Contracts Entered into after Final Judgment. —

Contracts for compensation must, in order to be considered champertous, have been entered into prior to the commencement of litigation, or during its pendency. Neither the common law, nor any of the statutes on the subject, seem to have contemplated an agreement made after the rendition of final judgment.<sup>9</sup> There is no rule of law or of common fairness between man and man which makes it improper for an attorney to be paid for his labor and skill, in prosecuting a suit to final judgment, from the amount recovered.<sup>10</sup>

### § 392. Presentation of Claims against Government. —

A contract for an attorney's compensation, to be paid out of the recovery on a claim against the government, which he has undertaken to collect, is not champertous.<sup>11</sup> The reason given for this

<sup>8</sup> See *infra*, § 435.

<sup>9</sup> *Dent v. Arthur*, 156 Mo. App. 472, 137 S. W. 285; *Reece v. Kyle*, 49 Ohio St. 475, 31 N. E. 747, 16 L.R.A. 723; *Floyd v. Goodwin*, 8 Yerg. (Tenn.) 484, 29 Am. Dec. 130. See also *Walker v. Cuthbert*, 10 Ala. 213; *Price v. Carney*, 75 Ala. 553; *Ross v. Chicago, R. I. & P. R. Co.*, 55 Iowa 691, 8 N. W. 644; *Taylor v. St. Louis Transit Co.*, 198 Mo. 715, 97 S. W. 155.

So an assignment of an interest in a judgment to the attorney in consideration of legal services in procuring and sustaining it is not champertous. *Pittsburg, C. C. & St. L. R. Co. v. Volkert*, 58 Ohio St. 362, 50 N. E. 924; *Pennsylvania Co. v. Thatcher*, 78 Ohio St. 175, 85 N. E. 55; *Alexander v. Munroe*, 54 Ore. 500, 101 Pac. 903, 103 Pac. 514, 135 Am. St. Rep. 840. And see *Com. v. Terry*, 11 Pa. Super. Ct. 547.

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<sup>10</sup> *Pittsburg, C. C. & St. L. R. Co. v. Volkert*, 58 Ohio St. 362, 50 N. E. 924.

<sup>11</sup> *United States*.—U. S. Rev. Stat., § 823 (2 Fed. Stat. Annot. 276); *Wylie v. Coxe*, 15 How. 415, 14 U. S. (L. ed.) 753; *Wright v. Tebbitts*, 91 U. S. 252, 23 U. S. (L. ed.) 320; *Stanton v. Embry*, 93 U. S. 548, 23 U. S. (L. ed.) 983. See also *In re Paschal*, 10 Wall. 483, 19 U. S. (L. ed.) 992; *McPherson v. Cox*, 96 U. S. 417, 24 U. S. (L. ed.) 751; *Bachman v. Lawson*, 109 U. S. 659, 3 S. Ct. 479, 27 U. S. (L. ed.) 1067; *Taylor v. Bemiss*, 110 U. S. 42, 3 S. Ct. 441, 28 U. S. (L. ed.) 64; *Central, R. etc., Co. v. Pettus*, 113 U. S. 110, 5 S. Ct. 387, 28 U. S. (L. ed.) 915; *Maybin v. Raymond*, 4 Am. L. T. N. S. 21.

*Indiana*.—*Coquillard v. Bearss*, 21 Ind. 479, 83 Am. Dec. 362. Compare *Hart v. State*, 120 Ind. 83, 21 N. E. 654, 24 N. E. 151.

rule is that contracts of this character do not necessitate or encourage litigation, as, without its consent, the government cannot be sued.<sup>12</sup>

**§ 393. Aiding Poor Persons.**—The law of champerty and maintenance has never been carried so far in this country as to render objectionable the rendition of legal services, or the giving of assistance, in aid of the litigation of indigent persons.<sup>13</sup> Even in England, the defense of charity to a prosecution for maintenance seems to have been recognized at all times.<sup>14</sup> Indeed, to investigate the claims or redress the wrongs of the indigent and the injured is no quixotism, but a grave and highly honorable duty of the profession, the performance of which, if not voluntarily assumed, may be enforced by the court.<sup>15</sup> Such aid, however, must be gratuitous, and not coupled with a speculative venture on the outcome of the litigation.<sup>16</sup> In some states statutes relating to

*Kansas*.—*Jones v. Blacklidge*, 9 Kan. 562, 12 Am. Rep. 503; *McBratney v. Chandler*, 22 Kan. 692, 31 Am. Rep. 213.

*Maine*.—*Manning v. Perkins*, 85 Me. 172, 26 Atl. 1015.

*Massachusetts*.—*Manning v. Sprague*, 148 Mass. 18, 18 N. E. 673, 12 Am. St. Rep. 508, 1 L.R.A. 516.

*New York*.—*Sedgwick v. Stanton*, 14 N. Y. 289.

*Pennsylvania*.—*In re McFarland's Estate*, 4 Pa. St. 149; *Chester County v. Barber*, 97 Pa. St. 455.

<sup>12</sup> *Manning v. Sprague*, 148 Mass. 18, 18 N. E. 673, 12 Am. St. Rep. 508, 1 L.R.A. 516.

<sup>13</sup> *Jahn v. Champagne Lumber Co.*, 157 Fed. 407; *Perine v. Dunn*, 3 Johns. Ch. (N. Y.) 508; *Bristol v. Dunn*, 12 Wend. (N. Y.) 142, 27 Am. Dec. 122. See also *Byrd v. Oden*, 9 Ala. 755; *Quigley v. Thompson*, 53 Ind. 317; *Stotsenburg v. Marks*, 79 Ind. 193; *Gruber v. Baker*, 20 Nev. 469, 23 Pac. 858, 9 L.R.A. 302; *Shap-*

*ley v. Bellows*, 4 N. H. 355; *Thalhimer v. Brinkerhoff*, 3 Cow. (N. Y.) 623, 15 Am. Dec. 308; *State v. Chitty*, 1 Bailey L. (S. C.) 401; *Sherley v. Riggs*, 11 Humph. (Tenn.) 57; *Graham v. McReynolds*, 90 Tenn. 703, 18 S. W. 272. *In re Solicitors*, 9 Ont. L. Rep. 708 (gratuitous services by attorney); *Meloche v. Déguire*, 34 Can. Sup. Ct. 24.

<sup>14</sup> *Harris v. Briscoe*, 17 Q. B. D. (Eng.) 504; *Holden v. Thompson*, [1907] 2 K. B. (Eng.) 489, 11 Ann. Cas. 68. See also *Rothewel v. Pever*, Year Book 9 Hen. VI., 64; *Pomery v. Abbot of Buckfast*, Year Book 21 Hen. VI., 15; *Rex v. —*, 3 Mod. (Eng.) 97; *Findon v. Parker*, 11 M. & W. (Eng.) 675, 12 L. J. Exch. 444, 7 Jur. 903; *Bradlaugh v. Newdegate*, 11 Q. B. D. (Eng.) 1; *Savill v. Langman*, 79 L. T. N. S. (Eng.) 44.

<sup>15</sup> *Moore v. Campbell Academy*, 9 Yerg. (Tenn.) 115. And see *supra*, §§ 86, 88.

<sup>16</sup> *In re Evans*, 22 Utah 366, 62

champerty and maintenance expressly except suits of poor persons where charitable aid is given.<sup>17</sup>

**§ 394. Recovery on Quantum Meruit for Services Rendered under Champertous Contract.**—Although an attorney and his client may have entered into an agreement, in respect to compensation for the services of the former, which is void for champerty, yet the attorney does not thereby forfeit his right to full compensation for his services, nor the client his right to the fruits of the litigation after paying for such services what they are reasonably worth. In such cases the attorney may recover on a quantum meruit.<sup>18</sup> This rule, it has been said, harmonizes with the plainest principles of justice.<sup>19</sup> The other party cannot take the benefit of services rendered in his behalf, and escape liability for their reasonable value on the ground that his agreement was illegal.<sup>20</sup> There cannot, of course, be any recovery under the champertous contract;<sup>1</sup> nor can one recover on a bond,

Pac. 913, 83 Am. St. Rep. 794, 53 L.R.A. 952; *Meloche v. Deguire*, 34 Can. Sup. Ct. 24.

<sup>17</sup> *O'Driscoll v. Doyle*, 31 Colo. 193, 73 Pac. 27, wherein the court stated, with reference to the Colorado statute then under consideration, that it was copied from the Illinois statute (Rev. Stat., c. 30, § 108); and see *Casserleigh v. Wood*, 119 Fed. 308, 56 C. C. A. 212; *Casserleigh v. Wood*, 14 Colo. App. 265, 59 Pac. 1024.

*The Tennessee* code exempts from the operation of the champerty and maintenance laws "the exception contained in the ancient law." The maintenance of a suit out of charity and compassion has been declared to be one of these exceptions. See *Graham v. McReynolds*, 90 Tenn. 703, 18 S. W. 272.

<sup>18</sup> *United States*.—Conn. *v. Rice*, (C. C. A.) 204 Fed. 181.

*Arkansas*.—*Davis v. Webber*, 66

Ark. 190, 46 S. W. 822, 74 Am. St. Rep. 81, 45 L.R.A. 196.

*Illinois*.—*Brush v. Carbondale*, 229 Ill. 144, 11 Am. Cas. 121, 82 N. E. 252. But see *Dreyfuss v. Jones*, 116 Ill. App. 75.

*Kentucky*.—*Rust v. Larue*, 4 Litt. 411, 14 Am. Dec. 172; *Caldwell v. Shepherd*, 6 T. B. Mon. 389; *Bowser v. Patrick*, 65 S. W. 824, 23 Ky. L. Rep. 1578.

*Michigan*.—See *Willey v. Crane*, 69 Mich. 17, 36 N. W. 734.

*Wisconsin*.—*Stearns v. Felker*, 28 Wis. 594.

<sup>19</sup> *Brush v. Carbondale*, 229 Ill. 144, 11 Am. Cas. 121, 82 N. E. 252; *Stearns v. Felker*, 28 Wis. 594.

<sup>20</sup> *Brush v. Carbondale*, 229 Ill. 144, 11 Am. Cas. 121, 82 N. E. 252.

<sup>1</sup> *Leonard v. Boyd*, 71 S. W. 508, 24 Ky. L. Rep. 1320; *Mazureau v. Morgan*, 25 La. Ann. 281.

given for a fee due under such a contract,<sup>2</sup> nor can the compensation stipulated for therein be considered in estimating the value of the services actually rendered.<sup>3</sup> Champertous provisions if clearly severable may be rejected.<sup>4</sup> In some jurisdictions no recovery can be had for services rendered under a contract obnoxious for champerty,<sup>5</sup> though recovery may be had for services rendered prior to such contract.<sup>6</sup> Thus where an attorney became a party to a scheme by which litigation was illegally instigated, it was held that, even if the illegal contract was subsequently set aside or ignored, the original vice in the scheme still existed; and that the attorney could not purge his conduct and obtain the benefit of such litigation by ignoring the original special contract, and suing on a quantum meruit. Nor could he accomplish that result by attempting to abandon the original contract, and make a new one in furtherance of the unlawful scheme. Nor would it make any difference when he became a party to the scheme.<sup>7</sup> The rule that an attorney may, notwithstanding a champertous contract as to his compensation, recover the reasonable value of services lawfully performed, in litigation legitimately instituted, is not applicable in such cases.<sup>8</sup>

### *Purchase of Litigious Rights.*

§ 395. **Generally.** — The purchase of a lawsuit by an attorney is the most odious form of champerty.<sup>9</sup> Thus it has been said that to allow an attorney to purchase a chose in action in

<sup>2</sup> *Roller v. Murray*, 107 Va. 527, 59 S. E. 421.

<sup>3</sup> *Holloway v. Lowe*, 1 Ala. 246; *Roller v. Murray*, 107 Va. 527, 59 S. E. 421.

<sup>4</sup> *Newport Rolling Mill Co. v. Hall*, 117 Ky. 598, 144 S. W. 760.

<sup>5</sup> *Mazureau v. Morgan*, 25 La. Ann. 281; *Taylor v. Perkins*, (Mo.) 157 S. W. 122; *Butler v. Legro*, 62 N. H. 350, 13 Am. St. Rep. 573; *Roller v. Murray*, 112 Va. 780, Ann. Cas. 1913B 1088, 72 S. E. 665, 38 L.R.A.(N.S.) 1202.

<sup>6</sup> *Thurston v. Percival*, 1 Pick. (Mass.) 415.

<sup>7</sup> *Gammons v. Gulbranson*, 78 Minn. 21, 80 N. W. 779.

<sup>8</sup> *Gammons v. Johnson*, 76 Minn. 76, 78 N. W. 1035, distinguishing *Gammons v. Johnson*, 69 Minn. 488, 72 N. W. 563.

<sup>9</sup> *Slade v. Zeitfuss*, 77 Conn. 457, 59 Atl. 406; *Burnham v. Hesclton*, 82 Me. 495, 20 Atl. 80, 9 L.R.A. 90; *Arden v. Patterson*, 5 Johns. Ch. (N. Y.) 44.

consideration that he will bring suit to collect it, with the right to retain an exorbitant share thereof, would shock the moral sense of all right-minded people.<sup>10</sup> The mischief which the law of champerty aims to prevent is that of encouraging litigation by persons who have no interest therein independent of that to be derived from carrying it on in whole or in part at their expense; and that vice certainly exists where an attorney purchases a claim with the intent thereafter to commence suit, or carry on pending litigation, at his own expense and for his own benefit, as effectively as where he agrees to carry on litigation at his own expense in the name of another.<sup>11</sup> That one is an attorney at law does not however prevent him from purchasing an alleged tax title from the county, and prosecuting an action to establish title based thereon.<sup>12</sup> Though the conveyance of land in actual adverse possession<sup>13</sup> at private sale<sup>14</sup> is void as to the adverse possessor or those in privity with him,<sup>15</sup> the express or implied covenants of a deed of land adversely held are available to the grantee, in spite of the rule against champertous conveyances.<sup>16</sup> An assignment of a claim for collection, with an agreement that the assignee upon making the collection is to pay to the assignor one-half the amount collected, together with a sum previously advanced by the

<sup>10</sup> *Dahms v. Sears*, 13 Ore. 47, 11 Pac. 891.

<sup>11</sup> *United States*.—*Gregerson v. Im-lay*, 4 Blatchf. 503, 10 Fed. Cas. No. 5,795.

*Oregon*.—*Dahms v. Sears*, 13 Ore. 47, 11 Pac. 891.

*Pennsylvania*.—*Dickerson v. Pyle*, 4 Phila. 259, 18 Leg. Int. 37.

*Rhode Island*.—*Tyler v. Superior Ct.*, 30 R. I. 107, 73 Atl. 467, 23 L.R.A. (N.S.) 1045.

*Wisconsin*.—*Miles v. Mutual R. F. L. Assoc.*, 108 Wis. 421, 84 N. W. 159; *Emerson v. McDonnell*, 129 Wis. 67, 107 N. W. 1037.

<sup>12</sup> *Griffith v. Anderson*, 22 Idaho 323, 125 Pac. 218.

<sup>13</sup> *Brown v. White*, 153 Ky. 452, 156 S. W. 96.

The maintenance of a structure over a passway without affecting the surface of the way or the use thereof is not an ouster of the possession of the way or of the space above the soil which the structure did not occupy, so as to avoid a conveyance of the fee as champertous. *Goodwin v. Bragaw*, 87 Conn. 31, 86 Atl. 668.

<sup>14</sup> *Brown v. White*, 153 Ky. 452, 156 S. W. 96.

<sup>15</sup> *Hornsby v. Tucker*, (Ala.) 61 So. 928.

<sup>16</sup> *Mackintosh v. Stewart*, (Ala.) 61 So. 956.

assignor for expense of making the collection, is not, however, contrary to good morals or public policy.<sup>17</sup>

§ 396. **Under Statutes.**—In many states there are statutory provisions which aim to prevent attorneys from acquiring litigious rights. Thus the California penal code provides that every attorney who, either directly or indirectly, buys, or is interested in buying, any evidence of debt or thing in action, with intent to bring suit thereon, is guilty of a misdemeanor.<sup>18</sup> So, in Connecticut it is provided, in effect, that an attorney who, with intent to make gain by the fees of collection, purchases and sues upon any choses in action, shall be fined not more than one hundred dollars.<sup>19</sup> The Louisiana civil code forbids the purchase, under pain of nullity, of litigious rights by attorneys and other officers of court, when they fall under the jurisdiction of the tribunal in which they exercise their functions.<sup>20</sup> This nullity is relative, and can be invoked only by the party to the suit against whom the right is to be exercised.<sup>1</sup> A Michigan statute provides: "No attorney, solicitor, or counselor shall, directly or indirectly, buy, or be in any manner interested in buying, any bond, promissory note, bill of exchange, book debt, or other thing in action, with the intent and for the purpose of bringing any suit thereon."<sup>2</sup> In South Caro-

<sup>17</sup> *Merchants' Protective Ass'n v. Jacobsen*, 22 Idaho 636, 127 Pac. 315.

<sup>18</sup> Cal. Penal Code § 161. See also *Bulkeley v. State Bank*, 68 Cal. 80, 8 Pac. 643; *Gage v. Downey*, (Cal.) 19 Pac. 113.

<sup>19</sup> Conn. Gen. Stat. § 1351. See also *Slade v. Zeitfuss*, 77 Conn. 457, 59 Atl. 406.

<sup>20</sup> *Louisiana*.—La. Civ. Code, Art. 2447. See also *Copley v. Lambeth*, 1 La. Ann. 316; *Copley v. Moody*, 2 La. Ann. 497; *Consol. Assoc. v. Comeau*, 3 La. Ann. 552; *Watterston v. Webb*, 1 La. Ann. 173; *Mullen v. Amas*, 7 La. Ann. 71; *New Orleans Gaslight Co. v. Webb*, 7 La. Ann. 164; *Buck v. Blair*, 36 La. Ann. 16; *Saint v. Martel*, 122 La. 93, 47 So. 413.

The statute applies to purchases made by attorneys who reside in a different parish or district from that in which sits the court wherein the suit originated; and the fact that the attorney has never practiced in that particular court will not shield him. *Denny v. Anderson*, 36 La. Ann. 762.

<sup>1</sup> *New Orleans Gas Co. v. Webb*, 7 La. Ann. 164; *Saint v. Martel*, 122 La. 93, 47 So. 413.

<sup>2</sup> *Randall v. Baird*, 66 Mich. 312, 33 N. W. 506; *Smedley v. Dregge*, 101 Mich. 200, 59 N. W. 411.

The statute does not prevent an attorney from buying a chattel of one person, and then suing another in replevin to get possession of it. *Town v. Tabor*, 34 Mich. 262.

lina it is provided, in substance, that an attorney who shall buy any demand for the purpose of putting it in suit, when the owner would not sue the same, shall pay a fine of one hundred dollars, and be incapable of practicing in any court until restored by the Supreme Court.<sup>3</sup> Under the provisions of the revised codes of Idaho, an attorney at law is prohibited and forbidden, either directly or indirectly, buying any evidence of debt or thing in action with intent of bringing suit thereon, and for a violation of this statute the attorney is held guilty of a misdemeanor.<sup>4</sup> Statutes of this character are not offended against by the mere nominal transfer of a claim for the purpose of facilitating the collection thereof, or to avoid expense and a multiplicity of suits,<sup>5</sup> nor by an agreement for a contingent fee,<sup>6</sup> or guaranteeing the collection of a claim.<sup>7</sup> It is recognized in many jurisdictions that an attorney may be a bona fide purchaser of choses in action and, as such, entitled to the aid of the courts in enforcing the claims so acquired.<sup>8</sup> Thus it has been held that the purchase by an attorney of a good and valid title to land in controversy, in a suit between his client and another, from persons not parties to the litigation, is not an objectionable purchase of litigious rights,<sup>9</sup> though such a purchase must come within the rules, heretofore stated, with reference to dealings between attorney and client, and the acquisition of adverse interests.<sup>10</sup> So the purchase of a final judgment has been held not to be the purchase of a litigious right;<sup>11</sup> but it is otherwise as to the purchase of a judgment from which

<sup>3</sup> S. C. Rev. Stat. (1893) 2293. See also *Cooke v. Poole*, 25 S. C. 593.

<sup>4</sup> Rev. Codes, § 6524. *Merchants' Protective Ass'n v. Jacobsen*, 22 Idaho 636, 127 Pac. 315.

<sup>5</sup> *Tuller v. Arnold*, 98 Cal. 522, 33 Pac. 445; *Herbstreit v. Beckwith*, 35 Mich. 95; *Smedley v. Dregge*, 101 Mich. 200, 59 N. W. 411; *Wightman v. Catlin*, 113 App. Div. 24, 37 Civ. Proc. 105, 98 N. Y. S. 1071.

<sup>6</sup> *Landry's Succession*, 116 La. 970, 41 So. 226; *Weeks v. Gattell*, 125 App. Div. 402, 109 N. Y. S. 977. See also *supra*, § 386.

<sup>7</sup> *Gregory v. Gleed*, 33 Vt. 405.

<sup>8</sup> *Philbrook v. Superior Court*, 111 Cal. 31, 43 Pac. 402; *Missouri, etc., R. Co. v. Bacon*, (Tex.) 80 S. W. 572.

<sup>9</sup> *Evans v. Wilkinson*, 6 Rob. (La.) 172.

<sup>10</sup> See *supra*, § 167. And see generally, *supra*, §§ 152-173.

<sup>11</sup> *Rogers v. Hendrick*, 85 Conn. 260, 82 Atl. 586; *Denton v. Willeox*, 2 La. Ann. 60. See also *Cooke v. Poole*, 25 S. C. 593.

an appeal is pending.<sup>12</sup> Good faith is no defense where the statutory provisions have been violated;<sup>13</sup> nor does the assignment of a non-negotiable chose in action, for the mere purpose of giving effect to an agreement which is contrary to public policy, make the assignee an equitable and bona fide owner of the chose assigned, so that he can bring an action upon it in his own name.<sup>14</sup> Violations of the statutes under consideration must be proved; they will not be presumed.<sup>15</sup>

**§ 397. In New York.** — The New York penal law provides that an attorney or counselor shall not:

(1) "Directly or indirectly buy, or be in any manner interested in buying, a bond, promissory note, bill of exchange, book debt, or other thing in action, with the intent and for the purpose of bringing an action thereon.

(2) "By himself, or by or in the name of another person, either before or after action brought, promise or give, or procure to be promised or given, a valuable consideration to any person, as an inducement to placing, or in consideration of having placed, in his hands, or in the hands of another person, a demand of any kind, for the purpose of bringing an action thereon, or of representing the claimant in the pursuit of any civil remedy for the recovery thereof. But this subdivision does not apply to an agreement between attorneys and counselors, or either, to divide between themselves the compensation to be received.

(3) "An attorney or counselor convicted of a violation of any of the provisions of this section, in addition to the punishment by fine and imprisonment prescribed therefor by this section, forfeits his office.

(4) "An attorney or counselor, who violates either of the first two subdivisions of this section, is guilty of a misdemeanor; and, on conviction thereof, shall be punished accordingly, and must be removed from office by the supreme court." <sup>16</sup>

<sup>12</sup> *Mullen v. Amas*, 7 La. Ann. 71.

<sup>13</sup> *Watterston v. Webb*, 4 La. Ann.

173; *Buck v. Blair*, 36 La. Ann. 16.

<sup>14</sup> *Slade v. Zeitfuss*, 77 Conn. 457,  
59 Atl. 406.

<sup>15</sup> *Bulkeley v. State Bank*, 68 Cal.  
80, 8 Pac. 613.

<sup>16</sup> N. Y. Pen. Law § 274; N. Y.  
Code Civ. Pro. §§ 73-75. See also  
*Baldwin v. Latson*, 2 Barb. Ch. 306;



These are the only statutory provisions relating to champerty or maintenance now in force in this state,<sup>17</sup> although laws of a similar nature were in force theretofore,<sup>18</sup> and the common-law doctrine does not exist except as preserved by the statutes.<sup>19</sup>

The statute applies only to attorneys;<sup>20</sup> the purpose being to prevent them from encouraging, instigating or promoting ill-feeling and strife, and thereby securing the ownership or control of litigious rights for the purpose of bringing an action thereon;<sup>1</sup> and, being penal, the statute will not be extended by construction.<sup>2</sup>

In order to come within the language of the statute, the attorney must purchase some thing in action<sup>3</sup> for the purpose of bringing suit thereon.<sup>4</sup> The intent to bring suit must not be

*People v. Walbridge*, 3 Wend. 120; *Coughlin v. New York Cent., etc., R. Co.*, 71 N. Y. 443, 27 Am. Rep. 75; *Oisher v. Lazzarone*, 61 Hun 623 mem., 15 N. Y. S. 933; *Maxon v. Cain*, 22 App. Div. 270, 47 N. Y. S. 855; *Carpenter v. Cummings*, 20 Misc. 661, 46 N. Y. S. 252; *McCoy v. Gas Engine & Power Co.*, 71 Misc. 537, 129 N. Y. S. 251; *Sugarman v. Mandolla*, 88 N. Y. S. 393.

<sup>17</sup> *Browne v. West*, 9 App. Div. 135, 41 N. Y. S. 146.

<sup>18</sup> *Mann v. Fairehild*, 3 Abb. App. Dec. 152, 2 Keyes 106, *affirming* 5 Barb. 108, 14 Barb. 548; *Baldwin v. Latson*, 2 Barb. Ch. 306; *Williams v. Matthews*, 3 Cow. 252; *Berrien v. Mc-Lane*, Hoffm. 421; *Arden v. Patterson*, 5 Johns. Ch. 44; *Fogerty v. Jordan*, 2 Robt. 319; *Hall v. Gird*, 7 Hill 586.

<sup>19</sup> *Clark v. Grosh*, 81 Misc. 407, 142 N. Y. S. 966.

<sup>20</sup> *Irwin v. Currie*, 171 N. Y. 409, 64 N. E. 161, 58 L.R.A. 830, *reversing* 56 App. Div. 514, 67 N. Y. S. 380; *Browne v. West*, 9 App. Div. 135, 41 N. Y. S. 146; *Thompson v. Stiles*, 44 Misc. 334, 89 N. Y. S. 876.

<sup>1</sup> *Ransom v. Cutting*, 188 N. Y. 447, 81 N. E. 324, *affirming* 112 App. Div. 150, 98 N. Y. S. 282; *Wightman v. Catlin*, 113 App. Div. 24, 37 Civ. Proc. 105, 98 N. Y. S. 1071.

<sup>2</sup> *Tilden v. Aitkin*, 37 App. Div. 28, 29 Civ. Proc. 28, 55 N. Y. S. 735. See also *Ramsey v. Gould*, 57 Barb. 398, 39 How. Pr. 62; *Van Rensselaer v. Onandaga County Sheriff*, 1 Cow. 443; *Burling v. King*, 46 How. Pr. 452.

<sup>3</sup> *Van Dewater v. Gear*, 21 App. Div. 201, 47 N. Y. S. 503; *Blashfield v. Empire State Tel., etc., Co.*, 18 N. Y. S. 250.

<sup>4</sup> *Watson v. McLaren*, 19 Wend. 557; *Hall v. Bartlett*, 9 Barb. 297; *Fay v. Hebbard*, 42 Hun 490, 4 N. Y. St. Rep. 485; *Wightman v. Catlin*, 113 App. Div. 24, 37 Civ. Proc. 105, 98 N. Y. S. 1071; *Oldmixon v. Severance*, 119 App. Div. 821, 104 N. Y. S. 1042; *De Forest v. Andrews*, 27 Misc. 145, 29 Civ. Proc. 250, 58 N. Y. S. 358; *Gilroy v. Badger*, 27 Misc. 640, 58 N. Y. S. 392; *West v. Kurtz*, 15 Daly 99, 15 Civ. Proc. 424, 3 N. Y. S. 14, 2 N. Y. S. 110.

merely incidental and contingent; it should rather appear to be the primary purpose of the purchase.<sup>5</sup>

The "things in action" intended by the statute are those on which a suit can be brought,<sup>6</sup> such as pre-existing securities or demands; the term buying and purchasing being, in strictness, applicable only to such.<sup>7</sup> But it is immaterial whether the claim is to be enforced by a suit in equity or by an action at law,<sup>8</sup> or whether the transfer be taken in the name of the attorney or that of another person for him.<sup>9</sup>

The code also prohibits attorneys from giving, either to the client or to any other person, any valuable consideration as an inducement to placing claims in his hands, or in the hands of another, for the purpose of bringing an action thereon.<sup>10</sup>

It has been held that where it is set up in defense that the demand on which an action is founded was bought by an attorney or counselor at law contrary to the statute, the question presented is one for the determination of the court;<sup>11</sup> but it is evident that a conflict of evidence may be presented which will warrant the submission of the question to the jury.<sup>12</sup>

The statute does not apply to the purchase of land,<sup>13</sup> chattels,<sup>14</sup> corporate stock,<sup>15</sup> or judgments,<sup>16</sup> even though they are purchased

<sup>5</sup> *Moses v. McDivitt*, 88 N. Y. 62; *West v. Kurtz*, 15 Civ. Proc. 424, 15 Daly 99, 3 N. Y. S. 14.

<sup>6</sup> *Ramsey v. Erie R. Co.*, 8 Abb. Pr. N. S. 174; *Hirshbach v. Ketchum*, 5 App. Div. 324, 39 N. Y. S. 291.

<sup>7</sup> *Chenango Bank v. Hyde*, 4 Cow. 567.

<sup>8</sup> *Baldwin v. Latson*, 2 Barb. Ch. 306; *Mann v. Fairchild*, 14 Barb. 548; *Brotherson v. Consul*, 26 How. Pr. 213.

<sup>9</sup> *Browning v. Marvin*, 100 N. Y. 111, 2 N. E. 635.

<sup>10</sup> *In re Clark*, 184 N. Y. 222, 72 N. E. 1, affirming 108 App. Div. 150, 95 N. Y. S. 388; *Hess v. Allen*, 21 Misc. 393, 53 N. Y. S. 113.

The mere fact that the attorney, in order to prosecute a just claim

of his client, induces him to assign the claim to a third person, a neighbor of the attorney and having offices with him, does not show a violation of the statute, or that the attorney had any personal interest in the claim. *Wightman v. Catlin*, 113 App. Div. 24, 37 Civ. Proc. 105, 98 N. Y. S. 1071.

<sup>11</sup> *Orent v. Pettit*, 4 Denio 233.

<sup>12</sup> See *Gescheidt v. Quirk*, 66 How. Pr. 272, 5 Civ. Proc. 38.

<sup>13</sup> *Townsend v. Fromer*, 15 Civ. Proc. 8, 2 N. Y. S. 703.

<sup>14</sup> *Van Dewater v. Gear*, 21 App. Div. 201, 47 N. Y. S. 503.

<sup>15</sup> *Ramsey v. Gould*, 57 Barb. 398, 39 How. Pr. 62; *Ramsey v. Erie R. Co.*, 8 Abb. Pr. N. S. 174.

<sup>16</sup> *Van Rensselaer v. Onondaga*

for the purpose of issuing execution thereon and collecting the debt;<sup>17</sup> nor does it apply to agreements concerning pending suits,<sup>18</sup> or for contingent fees;<sup>19</sup> and the statute expressly excepts agreements between attorneys and counselors, or either, to divide between themselves the compensation to be received.<sup>20</sup> Nor has the statute any application where the purchase was made, not to bring suit on the thing purchased, but for the purpose of protecting substantial rights of the attorney,<sup>1</sup> or to compel other persons to do a particular thing,<sup>2</sup> such, for instance, as to compel the assignment of corporate stock.<sup>3</sup> So, it has been held that the language of the statute does not apply to the purchase of claims for the purpose of enforcing them by special proceedings, as, for instance, in the surrogate's court;<sup>4</sup> or in a court not of record,<sup>5</sup> or in another state.<sup>6</sup>

County Sheriff, 1 Cow. 443. See also *Zogbaum v. Parker*, 66 Barb. 341, *affirmed* 55 N. Y. 120.

<sup>17</sup> *Warner v. Paine*, 3 Barb. Ch. 630; *Brotherson v. Consalus*, 26 How. Pr. 213.

<sup>18</sup> *Wetmore v. Hegeman*, 88 N. Y. 69.

<sup>19</sup> *In re Fitzsimons*, 174 N. Y. 15, 66 N. E. 554, *reversing* 77 App. Div. 345, 12 N. Y. Ann. Cas. 250, 79 N. Y. S. 194; *Weeks v. Gattell*, 125 App. Div. 403, 109 N. Y. S. 977.

Where a disinherited son voluntarily entered into a written agreement retaining attorneys to oppose the probate of his father's will or to effect a settlement, agreeing to pay them specified percentages in either case, the mere fact that the agreement provided that the attorneys should not call upon him "for any sum or sums of money to pay the necessary disbursements required in the said proceedings," does not render it champertous. *Ransom v. Cutting*, 188 N. Y. 447, 81 N. E. 324, *affirming* 112 App. Div. 150, 98 N. Y. S. 282.

<sup>20</sup> *Hirshbach v. Ketchum*, 5 App. Div. 324, 39 N. Y. S. 291.

<sup>1</sup> *Van Rensselaer v. Onondaga County Sheriff*, 1 Cow. 443; *Baldwin v. Latson*, 2 Barb. Ch. 306.

<sup>2</sup> *Wightman v. Catlin*, 113 App. Div. 24, 37 Civ. Proc. 105, 98 N. Y. S. 1071.

<sup>3</sup> *Moses v. McDivitt*, 88 N. Y. 62.

<sup>4</sup> *Tilden v. Aitkin*, 37 App. Div. 28, 29 Civ. Proc. 28, 55 N. Y. S. 735, wherein it was said: "It will be observed that the words 'an action,' in section 73 (*supra*), were substituted in the place of 'any suit' in the former statute. (2 R. S. 288, § 70.) The word 'suit' is a more comprehensive word than 'action,' and might include a special proceeding. (See Century Dictionary.) The change of the statute in the Code of Civil Procedure, by substituting the word 'action' for 'suit,' indicates a legislative intent to limit the prohibition to cases where attorneys shall purchase demands with intent to commence 'actions'—as defined by the same statute—thereon."

<sup>5</sup> *Goodell v. People*, 5 Park. Crim. 206.

<sup>6</sup> *Roe v. Jerome*, 18 Conn. 138.

Nor does the statute "prohibit the receipt, by an attorney or counselor, of a bond, promissory note, bill of exchange, book debt, or other thing in action, in payment for property sold, or for services actually rendered, or for a debt antecedently contracted; or from buying or receiving a bill of exchange, draft, or other thing in action for the purpose of remittance, and without intent to violate" the law.<sup>7</sup>

While an attorney who buys a chose in action for the purpose of bringing any suit thereon cannot himself enforce the same, he acquires a good title which he may transfer to another either by gift or for value, and his donee or assignee may enforce such chose in action for his own benefit, although he was cognizant of the unlawful purpose with which the attorney purchased it. Of course, if it appears that the action brought by the attorney's donee or assignee is brought in the interest of the attorney, the court may refuse relief; but the presumption, in such case, is that the action is brought solely in the interest of the donee or assignee.<sup>8</sup> It is immaterial that such transferee is the wife of the attorney.<sup>9</sup> So, the attorney may retransfer the thing purchased to his vendor.<sup>10</sup>

### *Champertous Agreement as Defense to Action.*

§ 398. **General Rule.**—The general rule is that champerty can only be set up in defense of an action which has been brought on a contract which is tainted therewith; and that the existence of a champertous agreement, under which an attorney is to receive compensation, is no defense to an action brought by the attorney for his client,<sup>11</sup> either at law or in

<sup>7</sup> N. Y. Penal Law, § 275; N. Y. Code Civ. Pro. § 76. See also Epstein v. U. S. Fidelity, etc., Co., 29 Misc. 295, 60 N. Y. S. 527, reversing 28 Misc. 440, 58 N. Y. S. 1135; Lieberman v. Mandel, 98 N. Y. S. 201.

<sup>8</sup> Beers v. Washbond, 86 App. Div. 582, 83 N. Y. S. 993.

<sup>9</sup> Beers v. Washbond, 86 App. Div. 582, 83 N. Y. S. 993.

<sup>10</sup> Cretau v. Foote & Thorne Glass

Co., 40 App. Div. 215, 57 N. Y. S. 1103.

<sup>11</sup> England.—Hilton v. Woods, L. R. 4 Eq. 432; Elborough v. Ayres, L. R. 10 Eq. 367.

United States.—Burnes v. Scott, 117 U. S. 582, 6 S. Ct. 865, 29 U. S. (L. ed.) 991; Courtright v. Burnes, 13 Fed. 317; Globe Works v. U. S., 45 Ct. Cl. 497.

Alabama.—Ware v. Russell, 70 Ala.

equity;<sup>12</sup> nor can such fact be pleaded in abatement.<sup>13</sup> While it is

174, 45 Am. Rep. 82; *Sibley v. Alba*, 95 Ala. 198, 10 So. 831.

*Arkansas*.—*Missouri Pac. R. Co. v. Smith*, 60 Ark. 221, 29 S. W. 752.

*Georgia*.—*Reed v. Janes*, 84 Ga. 380, 11 S. E. 401.

*Illinois*.—*Torrence v. Shedd*, 112 Ill. 466; *Gage v. Du Puy*, 137 Ill. 652, 24 N. E. 541, 26 N. E. 386; *Burton v. Perry*, 146 Ill. 71, 34 N. E. 60; *Henderson v. Kibbie*, 211 Ill. 556, 71 N. E. 1091; *Elser v. Gross Point*, 223 Ill. 230, 79 N. E. 27, 114 Am. St. Rep. 326.

*Iowa*.—*Knadler v. Sharp*, 36 Iowa 232; *Small v. Chicago, etc., R. Co.*, 55 Iowa 582, 8 N. W. 437; *Vimont v. Chicago, etc., R. Co.*, 69 Iowa 296, 22 N. W. 906, 28 N. W. 612; *Galusha v. Wendt*, 114 Iowa 597, 87 N. W. 512; *Lacey v. Davis*, 98 N. W. 366. Compare *Allison v. Chicago & N. W. R. Co.*, 42 Iowa 274.

*Kansas*.—*Forbes v. Mohr*, 69 Kan. 342, 76 Pac. 827.

*Kentucky*.—*Caldwell v. Shepherd*, 6 T. B. Mon. 389; *Wehmhoff v. Rutherford*, 98 Ky. 91, 32 S. W. 288.

*Michigan*.—*Foley v. Grand Rapids & I. R. Co.*, 157 Mich. 67, 121 N. W. 257, 16 Detroit Leg. N. 246.

*Minnesota*.—*Isherwood v. H. L. Jenkins Lumber Co.*, 87 Minn. 389, 92 N. W. 230.

*Missouri*.—*Bent v. Priest*, 86 Mo. 475; *Pike v. Martindale*, 91 Mo. 268, 1 S. W. 858; *Euneau v. Rieger*, 105 Mo. 659, 16 S. W. 854; *Million v. Ohnsorg*, 10 Mo. App. 432; *Bent v. Lewis*, 15 Mo. App. 40; *Bick v. Overfelt*, 88 Mo. App. 140. But see *Kelerher v. Henderson*, 203 Mo. 516, 101 S. W. 1083, wherein it was suggested that the decision in *Bick v. Overfelt*,

*supra*, might have carried the rule a little too far.

*Nebraska*.—*Chamberlain v. Grimes*, 42 Neb. 701, 60 N. W. 948.

*New Hampshire*.—*Taylor v. Gilman*, 58 N. H. 417; *Connecticut River Mut. F. Ins. Co. v. Way*, 62 N. H. 622.

*New York*.—*Story v. Satterlee*, 13 Daly 169; *Hall v. Gird*, 7 Hill 586.

*North Dakota*.—*Woods v. Walsh*, 7 N. D. 376, 75 N. W. 767.

*Ohio*.—*Pennsylvania Co. v. Lombardo*, 49 Ohio St. 1, 29 N. E. 573, 14 L.R.A. 785.

*Rhode Island*.—*Hearn v. Hearn*, 24 R. I. 328, 53 Atl. 95.

*Tennessee*.—*Robertson v. Cayard*, 111 Tenn. 356, 77 S. W. 1056, *overruling Webb v. Armstrong*, 5 Humph. 381. These cases render obsolete decisions, under an earlier statute, in the following cases: *Vincent v. Ashley*, 5 Humph. 593; *Weedon v. Wallace*, Meigs 286; *Dowell v. Dowell*, 3 Head 502; *Hunt v. Lyle*, 8 Yerg. 142.

*Utah*.—*Potter v. Ajax Min. Co.*, 22 Utah 273, 61 Pac. 999.

*Virginia*.—*Roller v. Murray*, 107 Va. 527, 59 S. E. 421.

*Washington*.—*Straw-Ellsworth Mfg. Co. v. Cain*, 20 Wash. 351, 55 Pac. 321.

*West Virginia*.—*Davis v. Settle*, 43 W. Va. 17, 26 S. E. 557.

<sup>12</sup> *Hall v. Gird*, 7 Hill (N. Y.) 586. See also *Ross v. Chicago, R. I. & P. R. Co.*, 55 Iowa 691, 8 N. W. 644.

<sup>13</sup> *Missouri Pac. R. Co. v. Smith*, 60 Ark. 221, 29 S. W. 752; *Ellis v. Smith*, 112 Ga. 480, 37 S. E. 739; *Allison v. Chicago, & N. W. R. Co.*, 42 Iowa 274.

true that the right of litigation may be abused, and that proper remedies for groundless and vexatious litigation must exist, these remedies should be such as not to impair the free use of the right itself; and as the justice or injustice of a cause cannot well be known before its termination, the checks upon unjust litigation must in general consist, not in excluding the suit or the suitor from the courts, but in redress following the decision of the cause upon the merits.<sup>14</sup> The defendant in the client's action is not a party to the champerty; he is not interested in it, nor in anywise injured by it. If his suit is founded upon a good cause of action there is no sound reason for holding that he may be released by showing that the plaintiff has made a void and unlawful agreement with his attorney concerning the fee and expenses of the suit.<sup>15</sup> It is time enough to turn a party out of court when he asks its aid to enforce the objectionable contract.<sup>16</sup> It has been held, however, that should a creditor transfer his cause of action to an attorney or other person under an agreement that the suit should be prosecuted in the name of the attorney or such other person, and for thus prosecuting the suit the attorney or such other person was to have a part thereof, then it would be available as a defense, because it would be an action the direct effect of which would be the enforcement of the champertous agreement.<sup>17</sup> Champerty as a defense in actions brought by the attorney for compensation will be considered in that connection.<sup>18</sup>

§ 399. Rule in Wisconsin. — The foregoing general rule does not prevail in Wisconsin. In that state the rule is that if it is proved on the trial of an action that an attorney is prosecuting the cause in pursuance of a champertous agreement with his client, the action should be dismissed on motion of the defendant;<sup>19</sup> so, it has been held that when a trial court is informed that an action

<sup>14</sup> *Burnes v. Scott*, 117 U. S. 582, 6 S. Ct. 865, 29 U. S. (L. ed.) 991; *Thallbimer v. Brinckerhoff*, 3 Cow. (N. Y.) 623, 15 Am. Dec. 308; *Robertson v. Cayard*, 111 Tenn. 356, 77 S. W. 1056.

<sup>15</sup> *Contright v. Burns*, 13 Fed. 317.

<sup>16</sup> *Bent v. Priest*, 86 Mo. 475; *Pike*

*v. Martindale*, 91 Mo. 268, 1 S. W. 858.

<sup>17</sup> *Weinhoff v. Rutherford*, 98 Ky. 91, 32 S. W. 288.

<sup>18</sup> See *infra*, § 421 et seq.

<sup>19</sup> *Barker v. Barker*, 14 Wis. 131; *Allard v. Lamirande*, 29 Wis. 502; *Kelly v. Kelly*, 86 Wis. 170, 56 N. W.

pending before it is tainted with champerty, it is its duty to refuse to proceed therein, and to dismiss the action.<sup>20</sup> Nor can an attorney, prosecuting an action under a champertous agreement in his client's absence, cancel such agreement and proceed with the action, even though he has a letter of attorney authorizing him to sue and do all things necessary in that behalf.<sup>1</sup> Champerty in a suit may be taken advantage of without being pleaded, and without an issue being formed in regard thereto, as it affects the right of the champertor to use the court, regardless of the merits of his claim; nor can champerty be waived by a party, or stipulated out of the case.<sup>2</sup> The taint of champerty, however, does not affect the merits of the case, but only the right of the champertor to use the court.<sup>3</sup> The burden of showing whether there is champerty or maintenance in the prosecution of an action is upon the defendant;<sup>4</sup> any conflict of evidence with relation thereto being for the jury.<sup>5</sup>

637. See also *Miller v. Larson*, 19 Wis. 463; *Martin v. Veeder*, 20 Wis. 466; *Stearns v. Felker*, 28 Wis. 594; *Miles v. Mutual Reserve Fund Life Assoc.*, 108 Wis. 421, 84 N. W. 159; *Emerson v. McDonald*, 129 Wis. 67, 107 N. W. 1037.

<sup>20</sup> *Decker v. Becker*, 143 Wis. 542, 128 N. W. 67.

<sup>1</sup> *Kelly v. Kelly*, 86 Wis. 170, 56 N. W. 637.

<sup>2</sup> *Miles v. Mutual Reserve Fund L. Assoc.*, 108 Wis. 421, 84 N. W. 159; *Decker v. Becker*, 143 Wis. 542, 128 N. W. 67.

<sup>3</sup> *Miles v. Mutual Reserve Fund L. Assoc.*, 108 Wis. 421, 84 N. W. 159.

<sup>4</sup> *Andrews v. Thayer*, 30 Wis. 228.

<sup>5</sup> *Decker v. Becker*, 143 Wis. 542, 128 N. W. 67.

## CHAPTER XIX.

### RIGHT TO COMPENSATION.

#### *In General.*

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#### *In General.*

§ 400. **Under the Civil Law.** — Under the ancient Roman or civil law advocates were not allowed to contract with their clients for compensation.<sup>1</sup> Throughout the whole growth of the

<sup>1</sup> Cod. lib. 2, tit. 6, l. 6, s. 2. See "The relation of patron and client also *Livingston v. Cornell*, 2 Mart. in republican Rome is too well known O. S. (L.) 281. to require comment. The client re-



civil law, from the foundation of Rome to the digest of Justinian, not only was the advocate always under incapacity to make any contract for his remuneration, but also, throughout a part of that time, he was under prohibition from receiving any gain for his services. Whether the name be *donum*, or *merces*, or *honorarium*, is immaterial, the substance of the law was invariable; he never could contract for *merces*, though during part of the time he might lawfully accept a *donum*.<sup>2</sup> In an early case<sup>3</sup> Chancellor Walworth reviews the status of the advocate under the civil law as follows: "Among the early institutions of Rome, when the relation of patron and client existed between the patrician and the plebeian, the patron, who had accepted the promise of fidelity from the client, was bound to render him advice and assistance, and to

received a sort of paternal protection from his patron, who assisted him (if necessary), by pleading in the forum, and by expounding the law. In return for this, the client was bound to perform sundry duties to his patron, somewhat in the nature of feudal services, as, for example, to contribute to pay his fines, or for his ransom, or the portioning of his daughter. Thus, though the patron received no direct reward for what he did for his clients, he was indirectly recompensed by the increase of his political influence. Afterwards there sprang up a class of persons who devoted themselves to legal studies, and who took fees for legal advice. This was forbidden by the Lex Cincia, passed B. C. 204, which forbade all payments for legal assistance. The Lex Cincia, having fallen into neglect, was revived by Augustus, A. U. C. 732. This was again evaded. The subject was then brought before the Emperor Claudius, who passed a law limiting the advocate's fee to 10,000 sesterces (about £80). By an order of Trajan, the fee was not to be paid until the work  
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was done, as we learn from Pliny's Epistle V. 21,—*peractis negotiis per-mittebatur pecuniam duntaxat decem millium dare*.' The fee, at a later period called *honorarium*, did not for certain technical reasons form the subject of what the Romans called *lactio*, but was recoverable by the *extraordinaria cognitio* before the magistrate or *præses* of the province. Sandar's Institutes, p. 475." Kennedy v. Broun, 13 C. B. N. S. 677, 696, 106 E. C. L. 677, 696, wherein the earlier cases are exhaustively reviewed.

<sup>2</sup> Kennedy v. Broun, 13 C. B. N. S. 677, 106 E. C. L. 677, reviewing the earlier authorities.

*Honoraire* is what is given to those, the honor of whose profession does not allow them to receive a salary, as advocates and physicians. It is called *honoraire* because it is honest to receive it, but shameful to demand it. It cannot be fixed by any convention; nor can it be sued for. Livingston v. Cornell, 2 Mart. O. S. (La.) 281.

<sup>3</sup> Adams v. Stevens, 26 Wend. (N. Y.) 451.

sustain him in his litigations without any other fee or reward than that which the client was bound to render him at all times, in virtue of his general relation of client. The relation which existed between them was similar to that of parent and child, or rather that of master and slave. But in the progress of society, when the relation of patron and client towards each other had totally changed, when the business of advocating causes in the courts had become a profession, and before the credit system pervaded all the relations of life, the client paid his advocate a fee in advance for his services, which was called a gratuity or present. As this was a mere honorary recompense, the client was under no legal obligation to pay it. But the result necessarily was, that if the usual present was not given, the advocate did not consider himself bound in honor to undertake the advocacy of the cause before the courts. Afterwards, Marcus Cincius Alimentus, the tribune of the people, procured the passage of the law known as the Cincian law, prohibiting the patron or advocate from receiving any money or other present for any cause; and annulling all gratuities or presents made by the client to the patron or advocate. But as no penalty was prescribed for the breach of this law, it, of course, became a dead letter. The Emperor Augustus afterwards re-enacted the Cincian law, and prescribed penalties for its breach. But towards the end of his reign, the advocates were again authorized to receive fees or presents from their clients. The Emperor Tiberius also permitted them to receive such forced gratuities. This led to the abuse referred to by Tacitus, and induced the Senate to insist upon the enforcement, or rather the re-enactment of the Cincian law, or rather the law limiting the amount of the fees of advocates, as referred to by Blackstone (3 Black. Com. 29, note 12). Nero revoked the law of Claudius, which was subsequently re-enacted by the Emperor Trajan, with the additional restriction that the advocate should not be permitted to receive his fee or gratuity until the cause was decided (1 Dupin aîné, 39). The younger Pliny mentions a law not referred to by Dupin, which authorized the advocate, after the pleadings in the cause had been made and the judgment had been given, to receive the fee which might be voluntarily offered by the client, either in money or a promise to pay. (See Merlin, art. Honoraires.)”

The rule under the Roman civil law was adopted, with some necessary qualifications, in England.<sup>4</sup> So, while many instances are to be found in the old French law books of advocates bringing suits for their fees, and recovering on them, this has long ago fallen into disuse.<sup>5</sup> But in Scotland, where the civil law also prevailed, it seems to have been disregarded in this respect.<sup>6</sup>

§ 401. Rule in England. — Under the rule now prevailing in England with respect to the compensation of counsel, a promise made by a client to pay money to a counsel for his advocacy, whether made before or during or after the litigation, has no binding effect,<sup>7</sup> even though the services of the advocate are to be

<sup>4</sup> See the section following.

<sup>5</sup> In the contest, in 1775, between Mr. Lingnet and the order of advocates, one of the charges against him was, that he had written to the Duke d'Aiguillon to demand his fees, and threatened him with an action for them; and that his demand upon the duke had been referred to arbitration. 7 *Journal Historique du Retablissement de la Magistrature*, 290. See also Livingston *v.* Cornell, 2 Mart. O. S. (La.) 281.

It is considered dishonorable by the Parisian bar to bring suits for counsel fees; and those who attempt to do it may be stricken from the roll of advocates. 1 Dupin aîné, Prof. d'Avocat, 110, 698. See also Adams *v.* Stevens, 26 Wend. (N. Y.) 451, 455.

<sup>6</sup> "Erskine, in his Institutes of the Law of Scotland, understands the law in the digest, *De extraordinariis cognitionibus*, as authorizing a suit for the fee of a physician or advocate, without a previous agreement for a specific sum. 2 Ersk. Inst. by Mac-Allen, 695. Whatever may have been the case in Rome itself, it is settled by the law of Scotland, where the civil law prevails, that an action may be

sustained on a promise to compensate an advocate or a physician for his services. (See Stair's Inst. by Brodie, b. 1, tit. 12, art. 5, and note b; 2 Bell's Law Dict. tit. Fees; Ersk. Inst. b. 3, tit. 3, art. 32; McKenzie *v.* Burntisland, Mor. Dict. of Decis. 11,421.)" Adams *v.* Stevens, 26 Wend. (N. Y.) 451, 454, per Walworth, Chancellor.

<sup>7</sup> Veitch *v.* Russell, 3 Q. B. 928, 43 E. C. L. 1041; Kennedy *v.* Broun, 13 C. B. N. S. 677, 106 E. C. L. 677.

In Kennedy *v.* Broun, 13 C. B. N. S. 677, 106 E. C. L. 677, it was said: "We are aware that, in the class of advocates, as in every other numerous class, there will be bad men, taking the wages of evil, and therewith also for the most part the early blight that waits upon the servants of evil. We are aware also that there will be many men of ordinary powers, performing ordinary duties without praise or blame. But the advocate entitled to permanent success must unite high powers of intellect with high principles of duty. His faculties and acquirements are tested by a ceaseless competition proportioned to the prize to be gained: that is, wealth and power and honor without, and active exercise

performed in a foreign country.<sup>8</sup> The employment of a barrister is a purely honorary one in the sense that it confers no legal right

for the best gifts of mind within. He is trusted with interests and privileges and powers almost to an unlimited degree. His client must rely on him at times for fortune and character and life. The law trusts him with a privilege in respect of liberty of speech which is in practice bounded only by his own sense of duty; and he may have to speak upon subjects concerning the deepest interest of social life, and the innermost feelings of the human soul. The law also trusts him with a power of insisting on answers to the most painful questioning; and this power, again, is in practice only controlled by his own view of the interests of truth. It is of the last importance that the sense of duty should be in active energy proportioned to the magnitude of these interests. If the law is, that the advocate is incapable of contracting for hire to serve when he has undertaken an advocacy, his words and acts ought to be guided by a sense of duty; that is to say, duty to his client, binding him to exert every faculty and privilege and power in order that he may maintain that client's right, together with duty to the court and himself, binding him to guard against abuse of the powers and privileges intrusted to him, by a constant recourse to his own sense of right. If an advocate with these qualities stands by the client in time of his utmost need, regardless alike of popular clamor and powerful interest, speaking with the boldness which a sense of duty can alone recommend, we say the service of such an advocate is beyond all price to the client;

and such men are guarantees for the maintenance of his dearest rights; and the words of such men carry a wholesome spirit to all who are influenced by them. Such is the system of advocacy intended by the law requiring the remuneration to be by gratuity. But, if the law allowed the advocate to make a contract of hiring and service, it may be that his mind would be lowered, and that his performance would be guided by the words of his contract rather than by principles of duty,—that words sold and delivered according to contract, for the purpose of earning hire, would fail of creating sympathy and persuasion in proportion as they were suggestive of effrontery and selfishness; and that the standard of duty throughout the whole class of advocates would be degraded. It may also well be, that, if contracts for hire could be made by advocates, an interest in litigation might be created contrary to the policy of the law against maintenance; and the rights of attorneys might be materially sacrificed, and their duties be imperfectly performed by unscrupulous advocates; and these evils, and others which might be suggested, would be unredeemed by a single benefit that we can perceive."

<sup>8</sup> "A member of the bar of England, in accordance with the law of that country and the rules of the profession to which he belongs, renders, and professes to render, services of a purely honorary character. If, in his professional capacity as an English barrister, he accepted a retainer to

to remuneration for his services; hence the remuneration of a barrister is called *honorarium* as opposed to *merces*. Even an express promise by the client himself to pay fees to counsel for his advocacy, whether made before or during or after the litigation, has no binding effect. The relation of counsel and client renders the parties mutually incapable of making any legal contract of hiring and service concerning advocacy in litigation. The requests and promises of the client and the services of counsel create neither an obligation nor an inception of obligation, nor any inchoate right whatever capable of being completed and made into a contract by any subsequent promise.<sup>9</sup> This rule is based on the practice under the civil law.<sup>10</sup>

There cannot be said to be any hard and fast present day method of fixing compensation to counsel. It is a matter of common knowledge that some prominent leading counsel demand and obtain large fees in cases where the parties or their solicitors consider it worth while to pay the fees demanded. In ordinary cases

appear and plead before commissioners and arbitrators in a foreign country, by whose law counsel practicing in its regular courts were permitted to have suit for their fees, that would not give him a right of action for his *honoraria*. His client would have a conclusive defense to such an action, on the ground that he was employed as a member of the English bar, and, by necessary implication, upon the same terms as to remuneration upon which the members of that bar are understood to practice." *Reg. v. Doutre*, 9 App. Cas. (Eng.) 745.

<sup>9</sup> 2 Halsbury's Laws of England, 392.

<sup>10</sup> See the preceding section.

The term *honorarium*, as applicable to a counsel's fee, was introduced in England by Sir John Davys, who said: "Our learned men in the law do not grow to good estates by any illiberal means, but in a most in-

genious and worthy manner. For, the fees or rewards which they receive are not of the nature of wages or pay, or that which we call salary or hire. That which is given is called *honorarium*, and not *merces*; it is not certain, not contracted for; for, no price or rate can be set upon counsel which is invaluable and inestimable, so as it is more or less according to circumstances, viz., the ability of the client, worthiness of the counselor, the weightiness of the cause, and the custom of the country. It is a gift of such a nature, and given and taken up on such terms, as, albeit the able client may not neglect to give it without note of ingratitude, yet the counselor may not demand it without doing injury to his reputation, according to that moral rule, *Multa honeste accipi possunt, quae honeste peti non possunt*." See *Kennedy v. Broun*, 13 C. B. N. S. 677, 106 E. C. L. 677.

there is an unwritten elastic scale of fees, based partly on the amount of work involved and partly on the importance and value of the matter in dispute. There is a special and much higher scale for Parliamentary drafting, and practice before Parliamentary committees. In many cases professional etiquette requires counsel to refrain from taking a brief outside the court or circuit where he usually practices without a special fee: the details of which are of merely local interest. In fixing a brief fee the difficulty and importance of the case and the amount involved are properly taken into consideration.<sup>11</sup> As a rule it may be said that remuneration is a matter of arrangement (not, of course, a legal contract) between individual counsel and solicitors; but the allowance of the fees agreed upon is subject to the discretion of the taxing master, and the court will not interfere with such discretion unless a gross mistake has been made.<sup>12</sup>

Where more than one counsel is employed, there is a long settled practice that the junior counsel should be allowed a fee proportionate to that of his leader on taxation.<sup>13</sup> Briefs to two counsel are usually allowed on taxation except in cases coming under Order LXV., rule 12 (sum recovered not more than £50). In such cases the costs of briefing more than one counsel will not be allowed, unless the taxing master shall, for special reasons, be of opinion that briefing more than one counsel was proper (Order LXV., rule 46). The fees of more than two counsel are allowed on taxation as between party and party only under special circumstances,<sup>14</sup> or even as between solicitor and client.<sup>15</sup>

Payment must be made before taxation and to counsel personally. By Order LXV., rule 52, no fee to counsel shall be allowed on taxation unless vouched by his signature. It is obvious that the requirement of signature for fees before taxation is an effective means of securing payment in most cases. Formerly it was

<sup>11</sup> *London Chatham & Dover R. Co. v. South Eastern R. Co.*, 60 L. T. N. S. (Eng.) 753.

<sup>12</sup> *Atty. Gen. v. Carrington*, 6 Beav. (Eng.) 454, 63 Rev. Rep. 142; *Brown v. Sewell*, 16 Ch. D. (Eng.) 517.

<sup>13</sup> *Brown v. Sewell*, 16 Ch. D. (Eng.) 517.

<sup>14</sup> *Smith v. Buller*, L. R. 19 Eq. (Eng.) 473; *Peel v. London & North Western R. Co.*, [1907] 1 Ch. (Eng.) 607.

<sup>15</sup> *In re Broad*, 15 Q. B. D. (Eng.) 420.

not thought that counsel's signature for fees on his brief or at the foot of a statement of fees was liable to stamp duty, but it has now been held that a voucher is a receipt within the meaning of the Stamp Act of 1891.<sup>16</sup> Counsel in a position to demand prepayment, and others who are fortunate enough to deal with business-like clients, usually receive with the brief a check for the fees marked thereon; further fees becoming due subsequently, such as refreshers and extra consultations, being settled for afterwards in the usual way. There is no way of settling disputes as to fees unless the parties choose to agree to refer the matter, informally, to arbitration. Fees not being recoverable, it follows that there can be no direct means of enforcing payment. But in some cases the law society will bring pressure to bear upon an offending member (but not all solicitors are members of the law society) who has received counsel's fees from his client and omits to pay them over. It is believed, however, that this is a somewhat precarious remedy.<sup>17</sup>

As to legal practitioners below the degree of counselor, however, a different rule prevails. Their fees are fixed by statute.<sup>18</sup>

**§ 402. Criticism of English Rule.** — The English rule which regards counsel fees as a mere honorary recompense, the payment of which is not obligatory on the client, has received but slight recognition in this country;<sup>19</sup> but, on the contrary, it has been

<sup>16</sup> General Council of the Bar *v.* Inland Revenue Com'rs, [1907] 1 K. B. (Eng.) 462.

<sup>17</sup> In *Thornhill v. Evans*, 2 Atk. (Eng.) 330, Lord Chancellor Hardwicke said: "Can it be thought that this court will suffer a gentleman of the bar to maintain an action for fees, which is *quiddam honorarium*, or, if he happens to be a mortgagee, to insist upon more than the legal interest, under pretense of gratuity or fees for business formerly done in the way of a counsel? To admit of such a clandestine way of coming at fees, is of much worse consequence than the other."

<sup>18</sup> 2 Halsbury's Laws of England, pp. 403-409. See also *Reg. v. Doutre*, 9 App. Cas. (Eng.) 745; *Poncher v. Norman*, 3 B. & C. 744, 10 E. C. L. 219; *Steadman v. Hockley*, 15 M. & W. (Eng.) 553.

<sup>19</sup> In some early Pennsylvania cases the English rule was followed. *Mooney v. Lloyd*, 5 Serg. & R. (Pa.) 412; *Lynch v. Com.*, 16 Serg. & R. (Pa.) 368, 16 Am. Dec. 582; *Brackenridge v. McFarlane, Add.* (Pa.) 49. These cases have long been *overruled*. *Foster v. Jack*, 4 Watts (Pa.) 334; *Walton v. Dickerson*, 7 Pa. St. 377; *Balsbaugh v. Frazer*, 19 Pa. St. 95.

expressly disapproved as being opposed to the general tenor of our laws.<sup>20</sup> It has been aptly said: "We have here no separate orders

See also the rule in New Jersey, *infra*, § 405.

<sup>20</sup> Davis *v.* Webber, 66 Ark. 190, 49 S. W. 822, 74 Am. St. Rep. 81, 45 L.R.A. 196; McDonald *v.* Napier, 14 Ga. 104; Stevens *v.* Adams, 23 Wend. (N. Y.) 57; Adams *v.* Stevens, 26 Wend. (N. Y.) 461; Newnan *v.* Washington, Mart. & Y. (Tenn.) 79.

*English Rule Disapproved.*—"Whatever may be the practice of other countries, however, the principle has never been adopted in this [New York] state that the professions of physicians and counselors are merely honorary, and that they are not of right entitled to demand and receive a fair compensation for their services, especially where there is an agreement to pay them a fixed compensation, or such a reasonable remuneration for their services as those services shall be deemed to be worth. The distinction of patron and client, which formed one of the fundamental laws of ancient Rome, ceased in this state when slavery was abolished; and it is wholly inconsistent with all our ideas of equality to suppose that the business or profession by which any one earns the daily bread of himself or of his family, is so much more honorable than the business of other members of the community as to prevent him from recovering a fair compensation for his services on that account. I have no doubt, therefore, that by the law of this state, as it has always existed from the time of its first settlement, the lawyer as well as the physician, was entitled to recover a compensation for his services; and that such

services were never considered here as gratuitous and honorary merely." Adams *v.* Stevens, 26 Wend. (N. Y.) 451.

In the same case, Senator Verplanck, in speaking of the old English rule, said: "So entirely does this rule depend upon arbitrary custom in Great Britain, that when you cross the Tweed it ceases, for the Scotch law holds that 'honoraries may be pursued;' *i. e.*, physicians and counselors may sue for their fees. When such contracts are not discreditable or unheard of, an implied agreement for the usual and fair compensation of such services may be presumed. . . . In a land wedded to old usages, we know that habit or prejudice may still keep up a distinction in form, that has long ago passed away in substance, and thus compel the counselor and the licentiate physician to look only to their honorary fees, while the surgeon or solicitor may sue for his bill; but in our own 'bank-note world,' on this side the Atlantic, and in an age when the greatest poets or novelists are willing to confess that they toil 'for gain, not glory,' it is ridiculous to attempt to perpetuate a monstrous legal fiction, by which the hard-working lawyers of our day, toiling till midnight in their offices, are to be regarded in the eye of the law in the light of the patrician juriconsults of ancient Rome, when

—dulce dici fuit et solenne reclusa,  
Mane domo vigilare, clienti promeri  
jura;

and who at daybreak received the early visits of their humble and de-



in society—none of those exclusive privileges which distinguish the lawyer in England, in order to attach him to the existing government, and which constitute him a sort of noble in the land—rising, by regular gradation, from an apprentice's humble seat in Westminster Hall, until he becomes a sergeant, and then is invited to a seat within the bar as king's counsel; after a little time [he] receives some sinecure appointment, or is placed on the bench for life, with a salary of many thousand pounds sterling; or is appointed solicitor-general to the king or the queen, or attorney-general, or perchance attains to the highest professional honors, by taking his seat on the woolsack; equal, whatever may have been his birth or his origin, to the proudest peer he looks upon. None of these privileges are possessed by the advocates and attorneys [in this country]. True, the latter may be promoted (if promotion it may be called) from a lucrative practice at the bar to a troublesome and unproductive, though honorable, seat on the bench. But, upon the whole, a lawyer in England is as different from a lawyer here as a man in a plain suit of black or blue—his head such as nature made it—is unlike him in appearance who has his body surrounded with a long robe and his head covered with a large wig.”<sup>21</sup> So, in Canada the English

pendent clients, and pronounced with mysterious brevity the oracles of the law.” *Adams v. Stevens*, 26 Wend. (N. Y.) 451.

<sup>21</sup> *Newnan v. Washington*, Mart. & Y. (Tenn.) 79.

In *McDonald v. Napier*, 14 Ga. 104, Nisbet, J., said: “We know not the distinctions of attorney, advocate, barrister, sergeant, etc., to which so great importance is attached in our fatherland. Advocates or counselors at [common law] cannot sue for compensation according to Blackstone, Lord Mansfield and Lord Hardwicke. The latter, in *Thornhill v. Evans*, exclaims with holy horror, ‘Can it be thought that this court will suffer a gentleman of the bar to maintain an action for fees, which is *quiddam*

*honorarium?*” (2 Atk. (Eng.) 332, Black. Com. 2d vol. 24. 25.) This honorarium is a voluntary donation, in consideration of services which admit of no compensation in money. Advocates are deemed (God save the mark!) to practice for honor or influence. And they were deemed so to do at Rome in the time of Cicero. He held in small esteem the strictly legal profession, and declined a fee or present for prosecuting Verres, and twits Hortensius for receiving an ivory sphinx for defending him. Yet the great advocate of Rome grew rich on presents. And so much was the bestowal of the honorarium abused in his day, that the senate interfered and regulated the matter by a decree. Notwithstanding Lord Hardwicke's

rule has been regarded in the light of a legal fiction. Thus, says an eminent jurist, "It is not a fact that counsel give their time and intellect for a mere *honorarium*, and it would not detract from their dignity or from the honor of their profession, nor would it impair or endanger the due administration of justice, if counsel, like the rest of mankind, were entitled by law to claim, and, if necessary, enforce payment of the reward which they had faithfully earned, and which was dishonestly withheld from them. It is not worth while to keep up a fiction against the actualities and realities of life that counsel do not, like other men, work for money, and need not be paid unless the clients as a mere favor choose to pay them; for it is notorious if they were not paid they would not work. . . . It is to a great extent a fallacy also to say that counsel fees cannot be sued for at law. They are sued for every day in the year. In England as a rule the client does not confer directly with the counsel. He goes to an attorney or solicitor and lays his case before him. The attorney prepares a written case, and lays it before counsel for his opinion, and he pays the counsel his fees for his opinion, and when the case is ready for trial or argument the attorney prepares a brief and delivers it to the counsel along with his fee. The attorney knows he is obliged to pay the counsel, and that he could not get the counsel to do one act for him if he did not pay him. The client is bound by law to pay all these counsel fees. The counsel cannot sue him for them, but the attorney who has paid them for him can sue him by calling them 'money paid for the client at his request.'"<sup>1</sup> Even under the canon law the advocate was entitled to compensation.<sup>2</sup>

exclamation, it is not questionable that lawyers in Great Britain above the grade of attorneys are better paid in money, and more liberally rewarded with honors, than in any other country."

<sup>1</sup> Wilson, J., in *McDougall v. Campbell*, 41 U. C. Q. B. 332.

<sup>2</sup> Under *Canon Law*.—The 131st canon enacted that "no judge shall admit any libel without the advice of

an advocate. No proctor shall conclude any cause without the knowledge of the advocate retained and feed; which if any proctor shall do, or by any color whatsoever defraud the advocate of his fee, he shall be suspended from all practice for six months, without hope of being restored before the said term be fully complete." *Kennedy v. Brown*, 13 C. B. N. S. 677, 106 E. C. L. 677.

§ 403. **Rule in Canada.** — As to the right of counsel to contract for, and to recover, compensation for professional services in Canada, no general rule can be stated, because, in this respect, the practice in each province is governed by its local laws. The English rule, however, has been disapproved.<sup>3</sup> It has been held that in proceedings before the exchequer and supreme courts, there being no tariff as between attorney and client, an attorney has the right in an action for his costs to establish the *quantum meruit* of his services.<sup>4</sup> In some of the provinces the rule is firmly established that counsel may sue for, and recover, compensation for their services. It has been so held in Ontario.<sup>5</sup> So, also, according to the law of Quebec, a member of the bar is entitled, in the absence of special stipulations, to sue for and recover on a *quantum meruit* in respect of professional services rendered by him, and may lawfully contract for any rate of remuneration which is not *contra bonos mores*, or in violation of the rules of the bar;<sup>6</sup> nor is that right lost by the performance of services in another province.<sup>7</sup> And in the Northwest Territory counsel fees are

<sup>3</sup> See the preceding section, note.

<sup>4</sup> *Paradis v. Bosse*, 21 Can. Sup. Ct. 419.

"There is no provision in the procedure of the supreme court for the ascertainment of costs between solicitor and client. In *Boak v. Merchants' Marine Ins. Co.*, [1 Can. Sup. Ct. 110] decided in June, 1879 (Cass. S. C. Dig., p. 677, No. 45), the chief justice refused an order directing the registrar to tax costs between solicitor and client, and stated that the question had been considered by the judges at the organization of the court, and it was deemed advisable not to regulate costs between solicitor and client. Accordingly the rule provides for costs between party and party only, and the tariff of fees is framed on that footing: Rule S. C. 57; and *Tariff, Cassels' S. C. Prac.*, p. 148. As a necessary consequence of this omission, the

counsel seeking to enforce recovery of fees for proceedings in the supreme court must resort to an action for compensation. The claim rests on a *quantum meruit*, supported by appropriate evidence. *Paradis v. Bosse*, 21 Can. Sup. Ct. 419; *Poucher v. Norman*, 3 B. & C. 744, 10 E. C. L. 219; *Armour v. Kilmer*, 28 Ont. 618.

<sup>5</sup> *McDougall v. Campbell*, 41 U. C. Q. B. 332; *Armour v. Kilmer*, 28 Ont. 618; *Millar v. Kanady*, 5 Ont. L. Rep. 412; *Gibson v. Le Temps Pub. Co.*, 10 Ont. L. Rep. 434.

<sup>6</sup> *Reg. v. Doutre*, 9 App. Cas. (Eng.) 745 (decided under the laws of Quebec); *Paradis v. Bosse*, 21 Can. Sup. Ct. 419 (decided under the laws of Quebec); *Gilman v. Cockshutt*, 18 Quebec 552.

<sup>7</sup> *Reg. v. Doutre*, 9 App. Cas. (Eng.) 745 (decided under the laws of Quebec).

on the same footing as other fees allowed by the tariff, and an advocate can recover them from a client by action.<sup>8</sup> Solicitors who employ counsel have implied authority to pledge the client's credit for the payment of counsel fees. A legal privity exists between client and counsel, though a solicitor has intervened in the usual way. It is a part of the solicitor's duty to instruct counsel in conducting litigation. There is, therefore, in retaining counsel by the solicitor, no delegation of duty which the solicitor could himself perform, and no benefit accrues to the solicitor by the employment of counsel.<sup>9</sup>

**§ 404. General Rule in United States.**—The rule generally prevailing throughout the United States is that an attorney is entitled to compensation for services rendered at the express or implied request of his client;<sup>10</sup> and that he may contract with his client for the rendition of services and the compensation which

<sup>8</sup> *Hamilton v. McNeill*, 2 N. W. Ter. 151. See also *Murray v. Royal Ins. Co.*, 1 West. L. Rep. (Vancouver) 8.

And see *Armour v. Dinner*, 4 N. W. Ter. 30, which is set out at note 9 of this section.

<sup>9</sup> *Armour v. Kilmer*, 28 Ont. 618, wherein it was also said that the text statement "marks the line of distinction between cases where the client is held responsible through the agency of his solicitor and those where the solicitor has been made to answer in person for work he directs to be done for the client. Where one attorney is employed by another to do attorney's work, though it be for the benefit of a client, the intendment is that credit is given to the attorney who employs the other, as in *Serace v. Whittington*, 2 B. & C. 11, 9 E. C. L. 7. *Quoad* such work the attorney who orders it is the principal."

*Compare Armour v. Dinner*, 4 N. W. Ter. 30, wherein Scott, J., said: "I am of opinion that when a solicitor or ad-

vocate is employed to carry on a suit or an appeal, and in the course of carrying on such suit or appeal, he does what is usual to be done in the way of disbursements for that object, he *prima facie* renders himself liable to the persons of whom he demands services to be performed or work to be done. The persons he employs are to look to the advocate and not to his clients for their pay; for instance, in appeals to the supreme court of Canada, the appeal books and factums have to be printed; the printer looks to the advocate who employed him and not to his clients."

<sup>10</sup> *United States*.—*Law v. Ewell*, 2 Cranch (C. C.) 144, 15 Fed. Cas. No. 8,127; *Farmers' Loan, etc., Co. v. McClure*, 78 Fed. 209, 49 U. S. App. 43, 24 C. C. A. 64; *William Firth Co. v. Millen Cotton Mills*, 129 Fed. 141; *Edwards v. Bay State Gas Co.*, 172 Fed. 971.

*Alabama*.—*Kidd v. Williams*, 132 Ala. 140, 31 So. 458, 56 L.R.A. 879.

*Arkansas*.—Davis *v.* Webber, 66 Ark. 190, 49 S. W. 822, 74 Am. St. Rep. 81, 45 L.R.A. 196.

*California*.—Dunlap *v.* Standard, etc., Min. Co., 61 Cal. 237; Aydelotte *v.* Bloom, 13 Cal. App. 56, 108 Pac. 877.

*Colorado*.—Willard *v.* Williams, 10 Colo. App. 140, 50 Pac. 207.

*Delaicarc*.—Stevens *v.* Monges, 1 Harr. 127.

*Florida*.—Stewart *v.* Beggs, 56 Fla. 565, 47 So. 932.

*Georgia*.—McDonald *v.* Napier, 14 Ga. 89; Wells *v.* Haynes, 101 Ga. 841, 28 S. E. 968; Dublin, etc., R. Co. *v.* Akerman, 2 Ga. App. 746, 59 S. E. 10; Coker *v.* Oliver, 4 Ga. App. 728, 62 S. E. 483.

*Indiana*.—Pennington *v.* Nave, 15 Ind. 323; Hauss *v.* Niblack, 80 Ind. 407.

*Iowa*.—Graham *v.* Dubuque Specialty Mach. Works, 138 Ia. 456, 114 N. W. 619, 15 L.R.A. (N.S.) 729; Graham *v.* Dillon, 144 Ia. 82, 121 N. W. 47.

*Kansas*.—Cooper *v.* Harvey, 77 Kan. 854, 94 Pac. 213.

*Kentucky*.—Caldwell *v.* Shepherd, 6 T. B. Mon. 389; Rust *v.* Larue, 4 Litt. 411, 14 Am. Dec. 172; Lilly *v.* Pryse, 54 S. W. 961, 21 Ky. L. Rep. 1223; Germania Safety Vault, etc., Co. *v.* Hargis, 64 S. W. 516, 23 Ky. L. Rep. 874.

*Louisiana*.—Copley *v.* Harrison, 3 Rob. 83; McCarty's Succession, 3 La. Ann. 517; Fenner *v.* McCan, 49 La. Ann. 600, 21 So. 768; Dinkelspiel *v.* Pons, 119 La. 236, 43 So. 1018.

*Maine*.—McLellan *v.* Hayford, 72 Me. 410, 39 Am. Rep. 343.

*Maryland*.—Calvert *v.* Coxe, 1 Gill 123.

*Massachusetts*.—Thurston *v.* Percival, 1 Pick. 415; Manning *v.* Osgood,

151 Mass. 148, 23 N. E. 732; Blair *v.* Columbian Fireproofing Co., 191 Mass. 333, 77 N. E. 762.

*Michigan*.—Brackett *v.* Sears, 15 Mich. 244; Detroit *v.* Whittemore, 27 Mich. 281; Eggleston *v.* Boardman, 37 Mich. 14; Marx *v.* McMorran, 136 Mich. 406, 99 N. W. 396, 11 Detroit Leg. N. 80.

*Minnesota*.—Calhoun *v.* Akeley, 82 Minn. 354, 85 N. W. 170; Lind *v.* Jones, 104 Minn. 302, 116 N. W. 579.

*Missouri*.—Webb *v.* Browning, 14 Mo. 354; Frissell *v.* Haile, 18 Mo. 18; Eoff *v.* Irvine, 108 Mo. 378, 18 S. W. 907, 32 Am. St. Rep. 609; Young *v.* Lanznar, 133 Mo. App. 130, 112 S. W. 17.

*New Hampshire*.—Smith *v.* Davis, 45 N. H. 566.

*New York*.—Lorillard *v.* Robinson, 2 Paige 276; Wilson *v.* Burr, 25 Wend. 386; Adams *v.* Stevens, 26 Wend. 455; Fischer-Hansen *v.* Brooklyn Heights R. Co., 173 N. Y. 492, 66 N. E. 395; O'Neill *v.* Crane, 65 App. Div. 358, 72 N. Y. S. 812; Sanford *v.* Bronson, 109 App. Div. 835, 96 N. Y. S. 859; Ross *v.* Bayer, etc., Co., 123 App. Div. 404, 107 N. Y. S. 1063; Steele *v.* Hammond, 136 App. Div. 667, 121 N. Y. S. 589; Spencer *v.* Busch, 50 Misc. 284, 98 N. Y. S. 690; Stoutenburgh *v.* Fleer, 87 N. Y. S. 504; St. John *v.* Bird, 110 N. Y. S. 389.

*Ohio*.—Christy *v.* Douglas, Wright 485.

*Oklahoma*.—Mellon *v.* Fulton, 22 Okla. 636, 98 Pac. 911, 19 L.R.A. (N.S.) 960.

*Oregon*.—Hamilton *v.* Holmes, 48 Ore. 453, 87 Pac. 154.

*Pennsylvania*.—Foster *v.* Jack, 4 Watts 334; Walton *v.* Dickerson, 7 Pa. St. 376; Balsbaugh *v.* Frazer, 19 Pa. St. 95; Heblieh *v.* Slater, 217 Pa.

St. 404, 66 Atl. 655; *Seybert v. Salem Twp.*, 22 Pa. Super. Ct. 459.

*South Carolina.*—*Clendinen v. Black*, 2 Bailey L. 488, 23 Am. Dec. 149; *Duncan v. Breithaupt*, 1 McCord L. 149.

*Tennessee.*—*Newnan v. Washington*, Mart. & Y. 79; *Phillips v. Overton*, 4 Hayw. 291; *Ingersoll v. Coal Creek Coal Co.*, 117 Tenn. 263, 10 Ann. Cas. 829, 98 S. W. 178, 119 Am. St. Rep. 1003, 9 L.R.A.(N.S.) 282; *Blount County Bank v. Smith*, 48 S. W. 296; *Campbell v. Provident Sav., etc., Soc.*, 61 S. W. 1090.

*Texas.*—*Fore v. Chandler*, 24 Tex. 146; *Hames v. Stroud*, 51 Tex. Civ. App. 562, 112 S. W. 775; *Raley v. Smith*, 73 S. W. 54.

*Virginia.*—*Parsons v. Maury*, 101 Va. 516, 44 S. E. 758.

*Vermont.*—*Vilas v. Downer*, 21 Vt. 419.

*Washington.*—*Schultheis v. Nash*, 27 Wash. 250, 67 Pac. 707.

*West Virginia.*—*Fidelity Ins., etc., Dep. Co. v. Shenandoah Valley R. Co.*, 40 W. Va. 627, 22 S. E. 90; *Weigand v. Alliance Supply Co.*, 44 W. Va. 133, 28 S. E. 803; *Watts v. West Virginia So. R. Co.*, 48 W. Va. 262, 37 S. E. 700; *Keenan v. Scott*, 64 W. Va. 137, 61 S. E. 806.

*Wisconsin.*—*Remington v. Eastern R. Co.*, 109 Wis. 154, 84 N. W. 898, 85 N. W. 321.

"When the courts hold, in the face of the common law to the contrary—in force in this country by express legislative enactment and otherwise—that such demands are legal, their decisions can rest upon no solid foundation, other than the recognition of the right to contract, based upon our constitution and laws, which, by reason of its inconsistency with the English law,

inhibiting the right to contract, has prevented so much of the English law from having force in this country. Because if, by the adoption of the common law, in gross, as the rule of decision in this country, those provisions of that law were in force, which denied to a counselor any capacity to contract with his client on account of his professional services, and which denied to the attorney any such capacity, beyond that which the law had made for him in assigning to every professional service its fixed and appropriate compensation, the courts could not decide that a recovery could be had for professional services founded upon any agreement as to such services, either express or implied. These decisions, then, rest upon the ground that the incapacity to contract as to professional services has been removed by inconsistent legislation in this country. In this [Arkansas] state—as, also, perhaps in most, if not all the other states—there has been no legislation on the subject, except the general provisions contained in the paramount law, that all free men, when they form a social compact, are equal, and have certain inherent and indefeasible rights, among which are those of acquiring, possessing and protecting property, and of pursuing their own happiness. It follows, then, that when the removal of the incapacity to contract for professional services is placed upon the ground of inconsistent legislation in this country, and that legislation, as in this state, is only the constitutional declaration, it must be removed without any other qualification or restriction than that which attaches to the privilege to contract enjoyed by citizens in general. The disability

he is to receive therefor.<sup>11</sup> Indeed, the principles of law applicable to the claims of attorneys for services, in so far as their right thereto is concerned, do not differ materially from those applicable to other contracts of employment.<sup>12</sup>

The right to compensation as dependent on admission to the bar,<sup>13</sup> and also the effect of failing to pay a license or occupation tax, where it is imposed, have been considered heretofore.<sup>14</sup>

**§ 405. Rule in New Jersey.** — The general rule stated in the preceding section does not apply in New Jersey. In that jurisdiction a distinction between attorneys and counselors is still recognized, although, in most cases, both of these offices unite in

under the English law was not, specially, that the counselor could not contract with his client for a part of the thing in controversy as a compensation for his services; but, generally, that in reference to these services, he could not contract at all. There was no provision of the law inhibiting the purchase of a part of the thing in dispute, which was peculiar to lawyers: it was a provision common to all persons. It is, therefore, requisite to know upon what basis that provision rested in the English law, in order to determine whether, under our legislation, it remains law in this state. Beyond any reasonable doubt the root of this doctrine was the principle of the common law, that a right of action could not be transferred by him who had the right, to another. This principle was interlaced with the doctrines of maintenance and champerty, and was founded upon the same reason. Lord Coke says: "That for avoidance of maintenance, suppression of right and stirring up suits, nothing in action, entry or re-entry can be granted over, for so, under color thereof, pretended titles might be granted to great

men, whereby right might be trodden down, and the weak oppressed." *Lytle v. State*, 17 Ark. 608.

<sup>11</sup> See *infra*, § 417.

<sup>12</sup> *McLellan v. Hayford*, 72 Me. 410, 39 Am. Rep. 343; *Blair v. Columbian Fireproofing Co.*, 191 Mass. 333, 77 N. E. 762; *Young v. Lanznar*, 133 Mo. App. 130, 112 S. W. 17; *Vilas v. Downer*, 21 Vt. 419.

"The circumstances under which a contract to pay a counselor at law for services rendered and expenses incurred may be inferred, and the character and effect of that contract do not essentially differ from those which pertain to, and regulate contracts for other professional services, skilled labor of any kind, and, in fact, any kind of service in which the amount of the compensation necessarily depends largely upon the circumstances under which the service is rendered, its nature, and the charges that are usual and customary for like services." *McLellan v. Hayford*, 72 Me. 410, 39 Am. Rep. 345.

<sup>13</sup> See *supra*, § 23.

<sup>14</sup> See *supra*, § 68.

one individual. The services of counsel are presumed to be gratuitous; and, therefore, are not recoverable by action.<sup>15</sup> It therefore follows that a delegation of power to an agent, or to a lawyer, to engage counsel in this state, would carry with it no delegation of power to enter into a contract to pay a specific sum for such services.<sup>16</sup> To this extent the rule would appear to be that which prevails in England.<sup>17</sup> But even the English rule, in so far as it incapacitates counsel to contract with his client for a recompense for his services, is not followed; thus, possibly in recognition of the constitutional right to contract, counsel may, in New Jersey, enter into an agreement with his client for compensation, and recover thereon.<sup>18</sup> So, also, where he renders professional services not as advocate or counsel, but merely in the capacity of attorney, recovery may be had therefor even though such compensation was not agreed upon; and it is immaterial that he who rendered the services as attorney is also a counselor.<sup>19</sup> It

<sup>15</sup> Seeley *v.* Crane, 15 N. J. L. 35; VanAtta *v.* McKinney, 16 N. J. L. 235; Schomp *v.* Schenck, 40 N. J. L. 195, 29 Am. Rep. 219; Hopper *v.* Ludlum, 41 N. J. L. 182; Bentley *v.* Maryland Fidelity, etc., Co., 75 N. J. L. 828, 15 Ann. Cas. 1178, 69 Atl. 202, 127 Am. St. Rep. 837.

<sup>16</sup> Bentley *v.* Maryland Fidelity, etc., Co., 75 N. J. L. 828, 15 Ann. Cas. 1178, 69 Atl. 202, 127 Am. St. Rep. 837.

<sup>17</sup> See *supra*, § 401.

In Schomp *v.* Schenck, 40 N. J. L. 195, 29 Am. Rep. 219, it was said: "The rule in question has always flourished in full vigor as a part of the common law, and has never, during any interval of time, fallen into disuse; and that as its only foundation was its supposed efficacy in sustaining the honorable standing of the advocate, I can by no means admit that such a rule is alien to the professional ethics of this country. The principle that the advocate cannot

stipulate with his client for his perquisites, is one of the established customs of our inherited jurisprudence, and is entirely consistent with our social conditions, and, therefore, in my opinion, is not to be eliminated except by legislation."

<sup>18</sup> Hopper *v.* Ludlum, 41 N. J. L. 182; Zabriskie *v.* Woodruff, 48 N. J. L. 610, 7 Atl. 336; Bentley *v.* Maryland Fidelity, etc., Co., 75 N. J. L. 828, 15 Ann. Cas. 1178, 69 Atl. 202, 127 Am. St. Rep. 837.

<sup>19</sup> Strong *v.* Mundy, 52 N. J. Eq. 533, 31 Atl. 611.

In Van Atta *v.* McKinney, 16 N. J. L. 235, it was said that in principle, it is lawful for a man to conduct and transact all his business by agent or servant, and that his law suits, even in a justice's court, form no exception. Every servant or agent is entitled to a reasonable remuneration for the time, care and labor bestowed upon the business of another; and so entitled that his claim may be enforced



has been so held with reference to services rendered in courts not of record.<sup>20</sup>

**§ 406. Retaining Fees.**—The term “retaining fee” or “retainer” indicates a preliminary fee given to an attorney or counsel to insure and secure his future services, and induce him to act for the client.<sup>1</sup>

The general rule is that an attorney who has been consulted professionally, or engaged in a cause, is entitled to one<sup>2</sup> reasonable retaining fee,<sup>3</sup> even though there was no express agreement there-

in a court of justice, the only exception being in the case of the advocate, or counsel, resting on its own peculiar reasons. But the remuneration allowable in this case is not for learning, talent, or ingenuity. Our law does not suppose these necessary to conduct the business of a justice's court. And remuneration may be recovered excepting for services strictly analogous to the duties of an attorney at law in the higher courts. Therefore, an attorney may recover a proper recompense for drawing accounts, or statements of demand; attending the court on the return of process, adjourn day, or trial day, in lieu of the party himself; collecting evidence, or whatever may be necessary to prepare the cause for trial, and present it duly to the court. But this does not include speaking to a cause in court, or advocating (however learnedly or eloquently) the one side or the other. The distinction between the duties of an advocate and attorney (though frequently, in our state, discharged by the same person, and therefore often confounded by the community) is well known in law.

<sup>20</sup> *Van Atta v. McKinney*, 16 N. J. L. 235.

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<sup>1</sup> *Agnew v. Walden*, 84 Ala. 504, 4 So. 672; *Union Surety, etc., Co. v. Tenney*, 200 Ill. 349, 65 N. E. 688; *Blair v. Columbian Fireproofing Co.*, 191 Mass. 336, 77 N. E. 762; *Severance v. Bizallion*, 67 Misc. 103, 121 N. Y. S. 627; *Schmidt v. Curtiss*, 72 Wash. 211, 130 Pac. 89.

The word “retainer” has been defined as signifying, “the act of a client by which he engages an attorney or counselor to manage a cause, either by prosecuting it, when he is plaintiff, or defending it, when he is defendant.” *Blair v. Columbian Fireproofing Co.*, 191 Mass. 333, 77 N. E. 762.

<sup>2</sup> *Schnell v. Schlernitzauer*, 82 Ill. 439; *Dillon v. McManus*, 121 Mo. App. 37, 97 S. W. 971; *Morton v. Croghan*, 1 Cow. (N. Y.) 233.

<sup>3</sup> *Alabama*.—See *Agnew v. Walden*, 84 Ala. 504, 4 So. 672.

*California*.—*Knight v. Russ*, 77 Cal. 410, 19 Pac. 698; *Roche v. Baldwin*, 143 Cal. 186, 76 Pac. 956; *Clements v. Watson*, 7 Cal. App. 74, 93 Pac. 385; *Aydelotte v. Bloom*, 13 Cal. App. 56, 108 Pac. 877.

*Illinois*.—*Schnell v. Schlernitzauer*, 82 Ill. 439; *Union Surety, etc., Co. v. Tenney*, 200 Ill. 349, 65 N. E. 688, *affirming* 102 Ill. App. 95.

for;<sup>4</sup> and it is immaterial whether he was or was not afterwards called upon to perform any service,<sup>5</sup> or that other counsel have been consulted.<sup>6</sup>

This rule is based on the theory that an attorney who has been

*Kansas*.—*Blackman v. Webb*, 38 Kan. 668, 17 Pac. 464.

*Massachusetts*.—*Aldrich v. Brown*, 103 Mass. 527; *Perry v. Lord*, 111 Mass. 504; *Blair v. Columbian Fireproofing Co.*, 191 Mass. 333, 77 N. E. 762.

*Michigan*.—*Eggleston v. Boardman*, 37 Mich. 14; *Kelly v. Richardson*, 69 Mich. 430, 37 N. W. 514.

*Oklahoma*.—*Mellon v. Fulton*, 22 Okla. 636, 98 Pac. 911, 19 L.R.A. (N.S.) 960.

<sup>4</sup> *Blackman v. Webb*, 38 Kan. 668, 17 Pac. 464; *Aldrich v. Brown*, 103 Mass. 527; *Perry v. Lord*, 111 Mass. 504; *Blair v. Columbian Fireproofing Co.*, 191 Mass. 333, 77 N. E. 762; *Eggleston v. Boardman*, 37 Mich. 14.

<sup>5</sup> *Clements v. Watson*, 7 Cal. App. 74, 93 Pac. 385; *Perry v. Lord*, 111 Mass. 504; *Blackman v. Webb*, 38 Kan. 668, 17 Pac. 464, wherein the court, in upholding the attorney's right to a retaining fee, said: "The right to a retaining fee follows every retainer. When an attorney is engaged to prosecute or defend in an action, his entire services in that action are engaged for his client, and he cannot perform services for the adverse party. He is retained by his client for that entire action; and whether his client may ever call upon him to perform services, or not, he cannot perform services in that action for the adverse party, nor can he receive any fee or compensation from the adverse party. All his skill and ability for that case are at the command

of his client. A retainer of an attorney at law is presumably worth something to the client, and presumably a loss to the attorney; and whether the attorney is ever called upon to perform any services or not in that case, he may when the case is terminated recover for whatever the evidence shows the retainer was worth."

If the client, after retaining counsel, chose not to avail himself of their services, that is his privilege, but it can furnish no ground for a refusal to pay the stipulated retaining fee. *Union Surety, etc., Co. v. Tenney*, 200 Ill. 349, 65 N. E. 688, *affirming* 102 Ill. App. 95.

*Compare* *Yates v. Shepardson*, 27 Wis. 238, wherein the court said: "We do not suppose a general retainer, where no actual services are rendered for which charges are made, entitles an attorney to sue his client for an annual counsel fee. Such is not our understanding of the effect of such an engagement. Of course parties may, and sometimes do, agree upon an amount which shall be paid as an annual counsel fee for professional advice, but this is the result of special contract. No such annual counsel fee can be claimed in consequence of a general retainer; nor, for that matter, can any claim for compensation be made by reason thereof, where no services have been rendered."

<sup>6</sup> *Pate v. Maples*, (Tenn.) 43 S. W. 740.

retained in a cause is, in consequence of such retainer, debarred from accepting employment from others whose interests are antagonistic to those of the person so retaining him; and further, that the act of retaining counsel places his skill, ability, and professional influence, at the disposal of the client.<sup>7</sup> So it has been held that it is no defense to an action on a contract to pay an attorney a percentage on all accounts collected "that it was entered into, not for the purpose of procuring plaintiff's legal services," but to silence his opposition to defendant's scheme in a matter of a public concern; it appearing that the attorney held no office.<sup>8</sup>

But it has been held that a retaining fee is recoverable only where there is an express promise to pay it,<sup>9</sup> or where such a promise can be implied from the facts established,<sup>10</sup> and an attorney is not entitled to recover a retainer for services in suits that were never brought, in the absence of an express agreement to that effect, since an agreement to pay a retainer for services which are never performed cannot be implied.<sup>11</sup>

In estimating the value of an attorney's services, it has been held that it is proper to include in the consideration a reasonable retaining fee;<sup>12</sup> but this seems to go farther than the rule warrants, at least in so far as it tends to sustain the view that a retaining fee may be recovered in addition to the actual value of the services rendered. The proper scope and application of the right to charge retainers is to remunerate counsel for being de-

<sup>7</sup> *Alabama*.—*Agnew v. Walden*, 84 Ala. 504, 4 So. 672.

*Kansas*.—*Blackman v. Webb*, 38 Kan. 668, 17 Pac. 464.

*Maine*.—*McLellan v. Hayford*, 72 Me. 410, 39 Am. Rep. 345.

*Massachusetts*.—*Blair v. Columbian Fireproofing Co.*, 191 Mass. 333, 77 N. E. 762.

*New York*.—*In re Schaller*, 10 Daly 57.

*Oklahoma*.—*Mellon v. Fulton*, 22 Okla. 636, 98 Pac. 911, 19 L.R.A. (N.S.) 960.

<sup>8</sup> *Jacks v. Thweatt*, 39 Ark. 340.

<sup>9</sup> *Windett v. Union Mut. L. Ins. Co.*,

144 U. S. 581, 12 S. Ct. 751, 36 U. S. (L. ed.) 551.

<sup>10</sup> *Orr v. Brown*, 69 Fed. 216, 30 U. S. App. 405, 16 C. C. A. 197; *Buckles v. Northeast Kansas Tel. Co.*, 79 Kan. 34, 99 Pac. 813; *McLellan v. Hayford*, 72 Me. 410, 39 Am. Rep. 345.

<sup>11</sup> *Windett v. Union Mut. Life Ins. Co.*, 144 U. S. 581, 12 S. Ct. 751, 36 U. S. (L. ed.) 551, *affirming* 36 Fed. 838.

<sup>12</sup> *Knight v. Russ*, 77 Cal. 410, 19 Pac. 698; *Roche v. Baldwin*, 143 Cal. 186, 76 Pac. 956; *Clements v. Watson*, 7 Cal. App. 74, 93 Pac. 385.

prived, by being retained for one party, of the opportunity of rendering services for and receiving pay from the other; not to swell the amount of a bill which accrues for services rendered throughout the progress of the cause, and which should, and usually does, contain specific charges for them all.<sup>13</sup>

In determining what is a reasonable sum to be charged by an attorney for entering into professional relations with a client, a variety of considerations are pertinent; among them are the ability and reputation of the attorney and the extent of the demand for his services by others in the community; the probability or improbability of the retainer's interfering with his professional relations with other persons who are, or who are likely to become, his clients; the magnitude and nature of the business for which he is retained, and the probability or improbability of its bringing him large remuneration from the client retaining him. If his retainer is general, including all business of the client for a stated period, the pertinent considerations are different from those resulting from an employment for a single case.<sup>14</sup>

In Canada it has been held that a retaining fee from a client to his solicitor is a mere gratuity; and, therefore, a promise to pay such a fee being without consideration, the solicitor has no right to deduct the amount thereof from funds of the client that may come into his hands.<sup>15</sup> But an agreement between a solicitor and his client for the payment to the solicitor of a yearly salary has been upheld.<sup>16</sup>

*For Services of Associate Counsel.*

**§ 407. Unauthorized Employment.**—In accordance with the principle stated heretofore to the effect that an attorney has no

<sup>13</sup> *McLellan v. Hayford*, 72 Me. 410, 39 Am. Rep. 343.

*Attorney for Assignee of Creditors.*

"An attorney who is employed by the assignee of creditors as his general adviser in all matters relating to the assignment, puts himself in such a position by becoming such general adviser that he cannot ask a retainer in such suits as he is called on to try in the course of his regular duties.

He is to be paid, of course, but he is not to be allowed anything as a retainer." *Matter of Schaller*, 10 Daly (N. Y.) 57.

<sup>14</sup> *Blair v. Columbian Fireproofing Co.*, 191 Mass. 333, 77 N. E. 762. And see *infra*, § 449.

<sup>15</sup> *In re Solicitor*, 22 Ont. L. Rep. 30, 19 Ann. Cas. 488. See also *In re McBride*, 2 Ch. Chamb. (Ont.) 153.

<sup>16</sup> *Falkiner v. Grand Junction R.*

implied power to delegate the authority reposed in him by his client,<sup>17</sup> it is well settled that he cannot employ associate counsel at the expense of his client unless he has been duly authorized to do so;<sup>18</sup> and if he does so without authority, he alone will be re-

Co., 4 Ont. 350. But see *Stevenson v. Kingston*, 31 U. C. C. P. 333.

<sup>17</sup> See *supra*, § 210. See also *Bentley v. Maryland Fidelity, etc., Co.*, 75 N. J. L. 828, 15 Ann. Cas. 1178, 69 Atl. 202, 127 Am. St. Rep. 837.

<sup>18</sup> *England*.—*Mostyn v. Mostyn*, L. R. 5 Ch. 457, 39 L. J. Ch. 780, 22 L. T. N. S. 461, 18 W. R. 657; *In re Harrisson*, 97 L. T. N. S. 902, 77 L. J. Ch. 143, 24 Times L. Rep. 118; *Serace v. Whittington*, 2 B. & C. 11, 9 E. C. L. 7. See also *Waller v. Holmes*, 6 Jur. N. S. 1367.

*Canada*.—*Hearn v. McNeil*, 32 Nova Scotia 210; *Armour v. Dinner*, 4 N. W. Ter. 30; *Augé v. Filiatrault*, 10 Quebec Super. Ct. 157; *Taylor v. Alexander*, 12 Quebec Super. Ct. 159; *Ex p. James*, 8 N. Burns. 286. *Compare Armour v. Kilmer*, 28 Ont. 618, wherein it was held that a solicitor has implied authority to employ counsel.

*United States*.—*Northern Pac. R. Co. v. Clarke*, 106 Fed. 794, 45 C. C. A. 635.

*Alabama*.—*King v. Pope*, 28 Ala. 601; *Humes v. Decatur Land Improvement & Furnace Co.*, 98 Ala. 461, 13 So. 368.

*Arkansas*.—*Fenno v. English*, 22 Ark. 170.

*California*.—*Porter v. Elizalde*, 125 Cal. 204, 57 Pac. 899; *Miller v. Ballerino*, 135 Cal. 566, 67 Pac. 1046, 68 Pac. 600.

*Colorado*.—*Emblem v. Bicksler*, 34 Colo. 496, 83 Pac. 636; *McCarthy v. Crump*, 17 Colo. App. 110, 67 Pac.

343; *Lathrop v. Hallett*, 20 Colo. App. 207, 77 Pac. 1095.

*Georgia*.—*Mathews v. Giles*, 108 Ga. 364, 33 S. E. 1006.

*Illinois*.—*Chicago, St. C. & M. R. Co. v. Larned*, 26 Ill. 218; *Hughes v. Zeigler*, 69 Ill. 38; *Evans v. Mohr*, 153 Ill. 561, 39 N. E. 1083; *Chicago, etc., Traction Co. v. Flaherty*, 222 Ill. 67, 78 N. E. 29; *Continental Adjustment Co. v. Hoffman*, 123 Ill. App. 69.

*Indiana*.—*Hogate v. Edwards*, 65 Ind. 372; *Brown v. Underhill*, 4 Ind. App. 77, 30 N. E. 430; *Moore v. Orr*, 10 Ind. App. 89, 37 N. E. 554.

*Iowa*.—*McCrary v. Ruddick*, 33 Iowa 521; *Gibson v. Chicago, M. & St. P. R. Co.*, 122 Iowa 565, 98 N. W. 474; *Gilliland v. Brantner*, 145 Iowa 275, 121 N. W. 1047.

*Kentucky*.—*Pittsburgh, C. & St. L. R. Co. v. Woolley*, 12 Bush 451; *Whitlow v. Whitlow*, 109 Ky. 573, 60 S. W. 182.

*Louisiana*.—*Voorhies v. Harrison*, 22 La. Ann. 85; *Forman v. Sewerage, etc., Board*, 119 La. 49, 12 Ann. Cas. 773, 43 So. 908.

*Massachusetts*.—*Brigham v. Foster*, 7 Allen 419.

*Michigan*.—*Lillis v. Pennsylvania Casualty Co.*, 131 Mich. 301, 91 N. W. 165.

*Minnesota*.—*White v. Esch*, 78 Minn. 264, 80 N. W. 976; *Calhoun v. Akeley*, 82 Minn. 354, 85 N. W. 170.

*Missouri*.—*Young v. Crawford*, 23 Mo. App. 434; *Bissell v. Zorn*, 122 Mo. App. 688, 99 S. W. 458.

*Nebraska*.—*McDowell v. Gregory*,

sponsible to the counsel so retained.<sup>19</sup> An attorney may, however, incur a reasonable expense in conducting the business intrusted to his care,<sup>20</sup> even though it involves the employment of another attorney; thus where a case is pending in another county, and it is necessary to attend to minor matters therein such as docket calls, obtaining orders, etc., which do not require the personal attention of counsel familiar with the cause, the fees paid to local counsel, employed by the original attorney to act for him, are properly chargeable to the client, for the reason that the rendition of such services necessarily involved expenditure, either by going to such other county in person, or by employment of counsel; and, having adopted the latter method, the fees of such counsel are as properly chargeable as the traveling expenses would have been.<sup>1</sup>

14 Neb. 33, 14 N. W. 899; *Sedgwick v. Bliss*, 23 Neb. 617, 37 N. W. 483.

*New Jersey*.—*Bentley v. Maryland Fidelity, etc., Co.*, 75 N. J. L. 828, 15 Ann. Cas. 1178, 69 Atl. 202, 127 Am. St. Rep. 837.

*New York*.—*Cook v. Ritter*, 4 E. D. Smith 253; *Matter of Bleakley*, 5 Paige 311; *Macniffe v. Ludington*, 13 Abb. N. Cas. 407, 67 How. Pr. 13; *In re Hynes*, 105 N. Y. 569, 12 N. E. 60; *Harwood v. La Grange*, 137 N. Y. 538, 32 N. E. 1000; *Matter of Borkstrom*, 63 App. Div. 7, 71 N. Y. S. 451, *affirmed* 168 N. Y. 639, 61 N. E. 1127; *Bassford v. Swift*, 17 Misc. 149, 39 N. Y. S. 337; *Meany v. Rosenberg*, 28 Misc. 520, 59 N. Y. S. 582, 32 Misc. 96, 65 N. Y. S. 497; *Dulon v. Camp*, 28 Misc. 548, 59 N. Y. S. 508; *Kneeland v. Hurdy*, 97 N. Y. S. 957.

*Pennsylvania*.—*Hewes v. Erie, etc., Transp. Co.*, 31 Pa. Co. Ct. 75.

*Texas*.—*Alcorn v. Butler*, 9 Tex. 56; *Smith v. Lipcomb*, 13 Tex. 537; *Ratcliff v. Baird*, 14 Tex. 43.

*Vermont*.—*Briggs v. Georgia*, 10 Vt. 68; *Scott v. Hoxsie*, 13 Vt. 50; *Pad-*

*dock v. Colby*, 18 Vt. 485; *Willard v. Danville*, 45 Vt. 93.

*Wisconsin*.—*Vilas v. Bundy*, 106 Wis. 168, 81 N. W. 812.

<sup>19</sup> *District of Columbia*.—*Dudley v. Owen*, 31 App. Cas. 177.

*Georgia*.—*Mathews v. Giles*, 108 Ga. 364, 33 S. E. 1006.

*Illinois*.—*English v. McConnel*, 23 Ill. 513.

*New York*.—*Crosby v. Kropf*, 33 App. Div. 446, 54 N. Y. S. 76; *Dulon v. Camp*, 28 Misc. 548, 59 N. Y. S. 508.

*Vermont*.—*Scott v. Hoxsie*, 13 Vt. 50.

<sup>20</sup> See *supra*, § 252. See also *Eggleston v. Boardman*, 37 Mich. 14; *Engle v. Chipman*, 51 Mich. 524, 16 N. W. 886; *Kingsbury v. Joseph*, 94 Mo. App. 298, 68 S. W. 93; *Vilas v. Bundy*, 106 Wis. 168, 81 N. W. 812.

<sup>1</sup> *Dillon v. Watson*, 3 Neb. (unofficial) Rep. 530, 92 N. W. 156.

*Compare* *Whitlow v. Whitlow*, 109 Ky. 573, 60 S. W. 182, wherein it was said that the phrase "necessary expenses" does not include a fee paid to associate counsel retained by the original attorney.

### § 408. Ratification of Unauthorized Employment. —

Even though an attorney unauthorizedly employs associate counsel to aid him, such employment may be subsequently ratified by the client; and, in such case, the client will be liable for the fees of the counsel so retained.<sup>2</sup> But the mere fact that the client has knowledge that counsel, not employed by him, is rendering him beneficial services, and that he permits him to do so without objection, is not sufficient to establish a ratification;<sup>3</sup> and this is especially true where the client has good reason to suppose that the counsel associated was looking to the original attorney for his fees.<sup>4</sup> Nor does the payment by the client of one associate counsel, estop him from denying his liability to another employed by the original attorney in the same matter.<sup>5</sup> Ratification generally has been considered heretofore.<sup>6</sup>

<sup>2</sup> *Alabama*.—*Johnson v. Cunningham*, 1 Ala. 249; *King v. Pope*, 28 Ala. 601.

*Arkansas*.—*Fenno v. English*, 22 Ark. 170.

*Illinois*.—*Price v. Hay*, 132 Ill. 543, 24 N. E. 620, *affirming* 29 Ill. App. 552, 31 Ill. App. 293.

*Indiana*.—*Hogate v. Edwards*, 65 Ind. 372; *Moore v. Orr*, 10 Ind. App. 89, 37 N. E. 554.

*Iowa*.—*Dorr v. Dudley*, 135 Ia. 20, 112 N. W. 203.

*Kansas*.—*Allen v. Parish*, 65 Kan. 496, 70 Pac. 351.

*Kentucky*.—*Pittsburgh, C. & St. L. R. Co. v. Woolley*, 12 Bush 451.

*Massachusetts*.—*Brigham v. Foster*, 7 Allen 419; *Aldrich v. Brown*, 103 Mass. 527.

*Missouri*.—*Southgate v. Atlantic & P. R. Co.*, 61 Mo. 89.

*Nebraska*.—*Sedgwick v. Bliss*, 23 Neb. 617, 37 N. W. 483.

*New Jersey*.—*Bentley v. Maryland Fidelity, etc., Co.*, 75 N. J. L. 828, 15 Ann. Cas. 1178, 69 Atl. 202, 127 Am. St. Rep. 837.

*New York*.—*Bratt v. Scott*, 63 Hun 632 mem., 18 N. Y. S. 507; *Reese v. Resburgh*, 54 App. Div. 378, 66 N. Y. S. 633; *Bassford v. Swift*, 17 Misc. 149, 39 N. Y. S. 337.

*North Carolina*.—*Rogers v. McKenzie*, 81 N. C. 164.

*Ohio*.—*Holmes v. Holland*, 11 Ohio Dec. (Reprint) 768, 29 Cine. L. Bul. 115.

*Texas*.—*Alcorn v. Butler*, 9 Tex. 56; *Smith v. Lipscomb*, 13 Tex. 537.

*Vermont*.—*Briggs v. Georgia*, 10 Vt. 68; *Paddock v. Colby*, 18 Vt. 485.

<sup>3</sup> *Porter v. Elizalde*, 125 Cal. 204, 57 Pac. 899; *McCarthy v. Crump*, 17 Colo. App. 110, 67 Pac. 343; *Lathrop v. Hallett*, 20 Colo. App. 207, 77 Pac. 1095; *Young v. Crawford*, 23 Mo. App. 434.

<sup>4</sup> *McCarthy v. Crump*, 17 Colo. App. 110, 67 Pac. 343; *Hudspeth v. Yetzer*, 78 Iowa 13, 42 N. W. 529. See also *Evans v. Mohr*, 42 Ill. App. 225, *affirmed* 153 Ill. 561, 39 N. E. 1083.

<sup>5</sup> *Evans v. Mohr*, 153 Ill. 561, 39 N. E. 1083, *affirming* 42 Ill. App. 225.

<sup>6</sup> See *supra*, §§ 211-214.

§ 409. **Authorized Employment.** — Where an attorney is authorized to retain associates, the counsel so employed may, of course, recover from the client the reasonable value of the services rendered;<sup>7</sup> and this right is not affected by the existence of a secret agreement between the client and the original attorney that the latter is to pay the fees of his associate.<sup>8</sup> So, also, a client will be liable for the compensation of associate counsel retained by an attorney whose employment is of such a general character as to amount to an agency for the client in the management of his legal business.<sup>9</sup>

*For Services Rendered in Aid of Indigent Persons.*

§ 410. **Common Law Rule in Criminal Cases.** — The power of the court to order a member of its bar to defend indigent persons charged with crime has been considered heretofore.<sup>10</sup>

It is well settled that, in the absence of statutory authority to the contrary, an attorney so appointed is not entitled to com-

<sup>7</sup> *California*.—*Miller v. Ballerino*, 135 Cal. 566, 67 Pac. 1046, 68 Pac. 600.

*Colorado*.—*Emblem v. Bieksler*, 34 Colo. 496, 83 Pac. 636.

*Iowa*.—*McCrary v. Ruddick*, 33 Iowa 521; *Dorr v. Dudley*, 135 Iowa 20, 112 N. W. 203.

*Kansas*.—*Allen v. Parish*, 65 Kan. 496, 70 Pac. 351.

*Massachusetts*.—*Brigham v. Foster*, 7 Allen 419; *Aldrich v. Brown*, 103 Mass. 527; *Hyde v. Moxie Nerve-Food Co.*, 160 Mass. 559, 36 N. E. 585.

*Missouri*.—*Bissell v. Zorn*, 122 Mo. App. 688, 99 S. W. 458; *Trimble v. Guardian Trust Co.*, 244 Mo. 228, 148 S. W. 934.

*New Jersey*.—*Bentley v. Maryland Fidelity, etc., Co.*, 75 N. J. L. 828, 15 Ann. Cas. 1178, 69 Atl. 202, 127 Am. St. Rep. 837.

*Texas*.—*Denison First Nat. Bank v. Hodges*, 62 S. W. 827. But see *Hern-*

*don v. Lammers*, 55 S. W. 414, wherein it was held that the counsel was bound by the agreement between the client and original attorney.

<sup>8</sup> *McCrary v. Ruddick*, 33 Iowa 521; *Brigham v. Foster*, 7 Allen (Mass.) 419.

<sup>9</sup> *Northern Pac. R. Co. v. Clarke*, 106 Fed. 794, 45 C. C. A. 635; *Cross v. Atchison, T. & S. F. R. Co.*, 141 Mo. 132, 42 S. W. 675, *affirming* 71 Mo. App. 585; *Fowler v. Iowa Land Co.*, 18 S. D. 131, 99 N. W. 1095; *Briggs v. Georgia*, 10 Vt. 68.

In *Singer v. Steele*, 24 Ill. App. 58, where the attorney entered into a partnership after being retained to make a collection, it was held that his partner had authority to render services in effecting the collection, and that the client was liable for such services.

<sup>10</sup> See *supra*, § 87.



compensation for his services;<sup>11</sup> the defense of poor prisoners, upon assignment by the court, being one of the duties contemplated by the lawyer's oath of office, which he impliedly assumes in accepting the privilege of practicing law,<sup>12</sup> though it is frequently spoken of as a charity.<sup>13</sup>

Requiring an attorney to defend poor persons without compensation is not antagonistic to the constitutional provision relating to the taking of property without compensation or without due process of law.<sup>14</sup> Nor is the question of the defendant's right to ap-

**11** *England*.—Wright *v.* Burroughes, 3 C. B. 344, 54 E. C. L. 344; Reg. *v.* Fogarty, 5 Cox C. C. 161.

*United States*.—Whelan *v.* Manhattan R. Co., 86 Fed. 219; Nabb *v.* U. S., 1 Ct. Cl. 173.

*Alabama*.—Posey *v.* Mobile County, 50 Ala. 6.

*Arkansas*.—Arkansas County *v.* Freeman, 31 Ark. 266.

*California*.—Rowe *v.* Yuba County, 17 Cal. 61; Lamont *v.* Solano County, 49 Cal. 158.

*Georgia*.—Elam *v.* Johnson, 48 Ga. 348.

*Illinois*.—Vise *v.* Hamilton County, 19 Ill. 78; Johnson *v.* Whiteside County, 110 Ill. 22.

*Kansas*.—Case *v.* Shawnee County, 4 Kan. 511, 96 Am. Dec. 190.

*Louisiana*.—State *v.* Simmons, 43 La. Ann. 991, 10 So. 382.

*Michigan*.—Bacon *v.* Wayne County, 1 Mich. 461.

*Mississippi*.—Dismukes *v.* Noxubee County, 58 Miss. 612, 38 Am. Rep. 339.

*Missouri*.—Kelley *v.* Andrew County, 43 Mo. 338.

*Montana*.—Johnston *v.* Lewis & Clark County, 2 Mont. 159.

*Nevada*.—Washoe County *v.* Humboldt County, 14 Nev. 123.

*New York*.—People *v.* Onondaga

County, 3 How. Pr. N. S. 1, 4 N. Y. Crim. 102; People *v.* Niagara County, 78 N. Y. 622.

*Pennsylvania*.—Wayne County *v.* Waller, 90 Pa. St. 99, 35 Am. Rep. 636.

*Tennessee*.—Wright *v.* State, 3 Heisk. 256; House *v.* Whitis, 5 Baxt. 690.

*Washington*.—Presby *v.* Klickitat County, 5 Wash. 329, 31 Pac. 876.

**12** Nabb *v.* U. S., 1 Ct. Cl. 173; Vise *v.* Hamilton County, 19 Ill. 78.

**13** *Arkansas*.—Arkansas County *v.* Freeman, 31 Ark. 266.

*California*.—Rowe *v.* Yuba County, 17 Cal. 61.

*Georgia*.—Elam *v.* Johnson, 48 Ga. 348.

*Illinois*.—Johnson *v.* Whiteside County, 110 Ill. 22.

*Montana*.—Johnston *v.* Lewis & Clarke County, 2 Mont. 159.

*New York*.—People *v.* Onondaga County, 3 How. Pr. N. S. 1, 4 N. Y. Crim. 102.

*Pennsylvania*.—Wayne County *v.* Waller, 90 Pa. St. 99, 35 Am. Rep. 636.

*Washington*.—Presby *v.* Klickitat County, 5 Wash. 329, 31 Pac. 876.

**14** Presby *v.* Klickitat County, 5 Wash. 329, 31 Pac. 876.

pear by counsel involved; for while he undoubtedly has such right, the government is under no obligation to provide, or to pay, his counsel,<sup>15</sup> in the absence of definite legislation to that effect.<sup>16</sup>

A different doctrine, however, formerly prevailed in some jurisdictions, wherein, although it was recognized that the courts have abundant power to appoint attorneys to defend poor persons, it was held that they could not require such attorneys to render services gratuitously; but that, upon such appointment, there arose an implied promise on the part of the county or state to pay a reasonable compensation to the attorney so appointed;<sup>17</sup> and, in accordance with this ruling, it was also held that a statute necessi-

<sup>15</sup> *Alabama*.—Posey *v.* Mobile County, 50 Ala. 6.

*Illinois*.—Johnson *v.* Whiteside County, 110 Ill. 22.

*Missouri*.—Kelley *v.* Andrew County, 43 Mo. 338.

*New York*.—People *v.* Albany County, 28 How. Pr. 22, followed without discussion in People *v.* Niagara County, 78 N. Y. 622.

*Utah*.—Pardee *v.* Salt Lake County, 39 Utah 482, 118 Pac. 122, 36 L.R.A. (N.S.) 377.

*Washington*.—Presby *v.* Klickitat County, 5 Wash. 329, 31 Pac. 876.

"It is true that it would be a disgrace to the jurisprudence of the age if a man should be tried without counsel merely because he is poor. It would be a worse disgrace if a man were allowed to starve in a country like this. Yet, if the legislature makes no provision for the poor, those who give in private charity would look in vain to the county for reimbursement. . . . The law has given us no power. If the boards of county commissioners close their bars to the appeals, and the legislature will not act, then, as heretofore, the matter must rest in the tender conscience and manly honor of the mem-

bers of the bar." Case *v.* Shawnee County, 4 Kan. 511, 96 Am. Dec. 190.

<sup>16</sup> *United States*.—Nabb *v.* U. S., 1 Ct. Cl. 173.

*Alabama*.—Posey *v.* Mobile County, 50 Ala. 6.

*Georgia*.—Elam *v.* Johnson, 48 Ga. 348.

*Illinois*.—Johnson *v.* Whiteside County, 110 Ill. 22.

*Kansas*.—Case *v.* Shawnee County, 4 Kan. 511, 96 Am. Dec. 190.

*Louisiana*.—State *v.* Simmons, 43 La. Ann. 991, 10 So. 382.

*Montana*.—Johnston *v.* Lewis & Clark County, 2 Mont. 159.

*New York*.—People *v.* Onondaga County, 3 How. Pr. N. S. 1, 4 N. Y. Crim. 102; People *v.* Albany County, 28 How. Pr. 22.

*Pennsylvania*.—Wayne County *v.* Waller, 90 Pa. St. 99, 35 Am. Rep. 636.

*Utah*.—Pardee *v.* Salt Lake County, 39 Utah 482, 118 Pac. 112, 36 L.R.A. (N.S.) 377.

*Washington*.—Presby *v.* Klickitat County, 5 Wash. 329, 31 Pac. 876.

<sup>17</sup> Blythe *v.* State, 4 Ind. 525; Webb *v.* Baird, 6 Ind. 13; Baker *v.* Knox County, 18 Ind. 170; Clay County *v.* McGregor, 171 Ind. 634, 17 Am. Cas. 333, 87 N. E. 1; Hall *v.* Washington

tating gratuitous service on the part of attorneys was unconstitutional.<sup>18</sup>

But it is to be observed that the decisions in these jurisdictions were generally based on some statutory authority; as, for instance, a statute compelling the appointment of counsel to defend indigent prisoners.<sup>19</sup> It was also conceded that while it was true that persons accused of crime had the constitutional right to be heard by counsel, it was not guaranteed that counsel would be furnished for them at the public expense.<sup>20</sup>

In all of these jurisdictions compensation is now allowed under statutes which, though possibly not as definite in some instances as would be required where the general rule prevails, are, nevertheless, construed to warrant the payment of counsel appointed thereunder to defend poor persons charged with crime.<sup>21</sup>

**§ 411. Statutes Providing for Compensation in Criminal Cases.**—In several states statutes have been enacted which provide for the remuneration of attorneys appointed to defend indigent persons who are charged with having committed certain crimes.<sup>1</sup> In order to be entitled to compensation, however, the

County, 2 G. Greene (Ia.) 473; Dane County *v.* Smith, 13 Wis. 585, 80 Am. Dec. 754.

*Recovery Beyond Allowance.*—An allowance made by the court does not prevent the attorney, in an action brought for that purpose, from recovering from the client the actual value of the services performed. *Cheek v. Schwartz*, 70 Ind. 339.

<sup>18</sup> *Blythe v. State*, 4 Ind. 525; *Webb v. Baird*, 6 Ind. 17; *Dane County v. Smith*, 13 Wis. 585, 80 Am. Dec. 754.

<sup>19</sup> *Fountain County v. Wood*, 35 Ind. 70; *Gordon v. Dearborn County*, 52 Ind. 322; *Montgomery County v. Courtney*, 105 Ind. 311, 4 N. E. 896; *State v. Miller*, 107 Ind. 39, 7 N. E. 758; *Carpenter v. Dane County*, 9 Wis. 274; *Dane County v. Smith*, 13 Wis. 585, 80 Am. Dec. 754.

<sup>20</sup> *Clay County v. McGregor*, 171 Ind. 634, 17 Ann. Cas. 333, 87 N. E. 1; *Houk v. Montgomery County*, 14 Ind. App. 662, 41 N. E. 1068; *Davis v. Linn County*, 24 Iowa 508.

<sup>21</sup> See the section following.

<sup>1</sup> *Alabama*.—Commissioners Ct. of Mobile *v.* Turner, 45 Ala. 199.

*Colorado*.—Washington County *v.* Murray, 45 Colo. 115, 100 Pac. 588.

*Indiana*.—Baker *v.* Knox County, 18 Ind. 170; *Gordon v. Dearborn County*, 52 Ind. 322; *Sage v. State*, 91 Ind. 141; *Miami County v. Mowbray*, 160 Ind. 10, 66 N. E. 46.

*Iowa*.—Ryce *v.* Mitchell County, 65 Iowa 447, 21 N. W. 771; *Clark v. Osceola County*, 107 Iowa 502, 78 N. W. 198; *State v. Behrens*, 109 Iowa 58, 79 N. W. 387; *Tomlinson v. Monroe County*, 134 Iowa 608, 112 N. W. 100.

facts must appear to be such as were contemplated by the statute with respect to the grade of the crime charged,<sup>2</sup> and the character

*Maine*.—Anonymous, 76 Me. 207.

*Michigan*.—Springer *v.* Board of Auditors, 99 Mich. 513, 58 N. W. 471; People *v.* Hanifan, 99 Mich. 516, 59 N. W. 611; Withey *v.* Osceola Circuit Judge, 108 Mich. 168, 65 N. W. 668; De Long *v.* Muskegon County, 111 Mich. 568, 69 N. W. 1115, 3 Detroit Leg. N. 767.

*Nebraska*.—Boone County *v.* Armstrong, 23 Neb. 764, 37 N. W. 626; Edmonds *v.* State, 43 Neb. 742, 62 N. W. 199.

*Nevada*.—Washoe County *v.* Humboldt County, 14 Nev. 123.

*New York*.—People *v.* Barone, 161 N. Y. 475, 14 N. Y. Crim. 378, 55 N. E. 1091; People *v.* Ferraro, 162 N. Y. 545, 57 N. E. 167; People *v.* Hampartjoomian, 198 N. Y. 515, 91 N. E. 286; People *v.* Heiselbetz, 30 App. Div. 199, 13 N. Y. Crim. 223, 51 N. Y. S. 685; People *v.* Coler, 44 App. Div. 183, 7 N. Y. Ann. Cas. 119, 60 N. Y. S. 656; People *v.* Coler, 61 App. Div. 538, 10 N. Y. Ann. Cas. 105, 15 N. Y. Crim. 460, 70 N. Y. S. 639; In re Monfort, 78 App. Div. 567, 79 N. Y. S. 765; People *v.* Montgomery, 101 App. Div. 338, 19 N. Y. Crim. 117, 91 N. Y. S. 765; People *v.* McElvaney, 36 Misc. 316, 10 N. Y. Ann. Cas. 316, 73 N. Y. S. 639; People *v.* Di Medicis, 39 Misc. 438, 17 N. Y. Crim. 163, 80 N. Y. S. 212; People *v.* Foster, 40 Misc. 19, 12 N. Y. Ann. Cas. 375, 81 N. Y. S. 212, affirmed 87 App. Div. 193, 84 N. Y. S. 97.

*Ohio*.—Geauga County Com'rs *v.* Ranney, 13 Ohio St. 388.

*Wisconsin*.—State *v.* Wentler, 76 Wis. 89, 44 N. W. 841, 45 N. W. 816;

Green Lake County *v.* Waupaca County, 113 Wis. 425, 89 N. W. 549.

*The New York Code of Criminal procedure* (§ 308) provides: "If the defendant appear for arraignment without counsel, he must be asked if he desires the aid of counsel, and if he does the court must assign counsel. When services are rendered by counsel in pursuance of such assignment in a case where the offense charged in the indictment is punishable by death, or on an appeal from a judgment of death, the court in which the defendant is tried or the action or indictment is otherwise disposed of, or by which the appeal is finally determined, may allow such counsel his personal and incidental expenses upon a verified statement thereof being filed with the clerk of such court, and also reasonable compensation for his services in such court, not exceeding the sum of five hundred dollars, which allowance shall be a charge upon the county in which the indictment in the action is found, to be paid out of the court fund, upon the certificate of the judge or justice presiding at the trial or otherwise disposing of the indictment, or upon the certificate of the appellate court; but no such allowance shall be made unless an affidavit is filed with the clerk of the county by or on behalf of the defendant, showing that he is wholly destitute of means."

<sup>2</sup> Tomlinson *v.* Monroe County, 134 Iowa 608, 112 N. W. 400; Green Lake County *v.* Waupaca County, 113 Wis. 425, 89 N. W. 549.

of the proceeding;<sup>3</sup> so, also, the statutory requirements must be complied with in all other respects.<sup>4</sup> The amount of such compensation will be considered hereafter.<sup>5</sup> It has been held that the number of counsel which may be appointed is discretionary with the court in the absence of a controlling provision of the statute in this respect.<sup>6</sup>

§ 412. **In Civil Actions.** — Many jurisdictions have provided by statute for allowing poor persons to sue *in forma pauperis*, and in connection therewith it is usual to empower the court, on the request of such litigants, to appoint counsel to act for them.<sup>7</sup> But these statutes do not provide for the compensation of counsel so appointed excepting that, in the event of success, reasonable fees may be allowed from the sum recovered.<sup>8</sup> The New York code, however, provides that counsel must "act therein without compensation;"<sup>9</sup> and the Indiana statute contains a similar provision.<sup>10</sup> Even in the absence of appointment by the court, and irrespective of statutory authority, there is no good reason why counsel cannot voluntarily aid poor persons if he wishes to do so without compensation. The rendition of such services is not only not objectionable, but may be, and undoubtedly often is, praiseworthy.<sup>11</sup>

*For Services Rendered to Persons under Disability, or Acting in Representative Capacity.*

§ 413. **Infants.** — The general incapacity of an infant to contract affects agreements entered into by him for the rendition of

<sup>3</sup> *People v. Prendergast*, 67 Misc. 541, 125 N. Y. S. 713.

<sup>4</sup> *State v. Behrens*, 109 Iowa 58, 79 N. W. 387.

<sup>5</sup> See *infra*, § 461.

<sup>6</sup> *People v. Heiselbetz*, 26 Misc. 100, 5 N. Y. Ann. Cas. 165, 13 N. Y. Crim. 470, 56 N. Y. S. 4, *appeal dismissed* 30 App. Div. 199, 13 N. Y. Crim. 223, 51 N. Y. S. 685. See however *supra*, § 87.

<sup>7</sup> See *supra*, § 86.

<sup>8</sup> *Whelan v. Manhattan R. Co.*, 86 Fed. 219, *construing* Act of July 20, 1892, § 4 (2 Fed. Stat. Annot. p. 294).

<sup>9</sup> N. Y. Code Civ. Pro. § 460. See also *In re Kelly*, 12 Daly (N. Y.) 110; *Harris v. Mutual L. Ins. Co.*, 59 Hun 625 mem., 13 N. Y. S. 718.

<sup>10</sup> *Howard County v. Pollard*, 153 Ind. 371, 55 N. W. 87.

<sup>11</sup> See *supra*, § 393.

professional services.<sup>12</sup> But as to services which have been actually rendered in good faith by an attorney at the request of a minor, and which can reasonably be regarded as being necessary for his relief, protection or support, a recovery may be had.<sup>13</sup> Thus when an infant has no guardian, but has rights involved in litigation, and a lawyer has espoused the cause of the infant and devoted his services to the protection of the infant's interests, and as the result of the litigation, an estate has been secured, it is just and proper, and within the principle on which an infant is held liable for necessities, that reasonable counsel fees should be paid out of the estate so obtained.<sup>14</sup> So professional services were deemed to be necessary when rendered in aid of an infant female who had been seduced,<sup>15</sup> and in defending a minor in a criminal prosecution;<sup>16</sup> but it has been held that services rendered in connection with ordinary property rights are not such "necessaries" as will warrant a recovery against an infant client.<sup>17</sup> The bur-

<sup>12</sup> *Pyle v. Cravens*, 4 Litt. (Ky.) 21; *Cobbey v. Buchanan*, 48 Neb. 391, 67 N. W. 176; *Phelps v. Worcester*, 11 N. H. 51. See also *infra*, § 418.

<sup>13</sup> *Connecticut*.—*Munson v. Washband*, 31 Conn. 303, 83 Am. Dec. 151.

*Maryland*.—*Sensenev v. Repp*, 94 Md. 77, 50 Atl. 416.

*Massachusetts*.—*Hallett v. Oakes*, 1 Cush. 296.

*Mississippi*.—*Epperson v. Nugent*, 57 Miss. 45, 34 Am. Rep. 434.

*Missouri*.—*Nagel v. Schilling*, 14 Mo. App. 576; *Houck v. Bridwell*, 28 Mo. App. 644.

*New Hampshire*.—*Barker v. Hibbard*, 54 N. H. 539, 20 Am. Rep. 160.

*New Jersey*.—*Colgate v. Colgate*, 23 N. J. Eq. 372.

*New York*.—*Petrie v. Williams*, 68 Hun 589, 23 N. Y. S. 237; *Bryant v. Brooklyn Heights R. Co.*, 64 App. Div. 542, 72 N. Y. S. 308.

*South Carolina*.—*Connor v. Ashley*, 57 S. C. 305, 35 S. E. 546.

*Texas*.—*Askey v. Williams*, 74 Tex. 294, 11 S. W. 1101, 5 L.R.A. 176; *Hanlon v. Wheeler*, 45 S. W. 821.

*Vermont*.—*Thrall v. Wright*, 38 Vt. 494.

<sup>14</sup> *Epperson v. Nugent*, 57 Miss. 45, 34 Am. Rep. 434.

Where the guardian of certain infants appeared as an attorney against them, and the relatives of such infants, and of others whose interests were the same, employed counsel to defend the interests of the infants, though counsel had been employed by the guardian for his wards, it was held that the estates of the infants were liable for a reasonable attorney's fee, the services having been for the manifest benefit of the infants. *Greenlee v. Rowland*, 85 Ark. 101, 107 S. W. 193.

<sup>15</sup> *Munson v. Washband*, 31 Conn. 303, 83 Am. Dec. 151.

<sup>16</sup> *Barker v. Hibbard*, 54 N. H. 539, 20 Am. Rep. 160.

<sup>17</sup> *Massachusetts*.—*Melisaac v. Ad-*

den of proof rests on the attorney to show that the services were such as will entitle him to compensation.<sup>18</sup>

§ 414. **Married Women.** — The contract of a married woman entered into with an attorney for professional services rests on the same footing as do other contracts made by her. In the absence of statutory authority, the common law disability remains; but in most states this disability has now been removed by statute, especially in regard to the care and management of her separate estate; and, where such enabling legislation exists, a married woman's contract for professional services is valid and binding.<sup>19</sup>

§ 415. **Insane Persons.** — As a general rule, a contract for professional services entered into between an attorney and a person of unsound mind is void; but where such services were actually performed in good faith, and were necessary, it would seem that a proper recompense therefor may be recovered.<sup>20</sup> Where one who

ams, 190 Mass. 117, 5 Ann. Cas. 729, 76 N. E. 654, 112 Am. St. Rep. 321.

*Nebraska.*—Englebert *v.* Troxell, 40 Neb. 195, 58 N. W. 852, 42 Am. St. Rep. 665, 26 L.R.A. 177; Cobbey *v.* Buchanan, 48 Neb. 391, 67 N. W. 176.

*New Hampshire.*—Phelps *v.* Worcester, 11 N. H. 51. See also *New Hampshire Mut. F. Ins. Co. v. Noyes*, 32 N. H. 345.

*Vermont.*—Thrall *v.* Wright, 38 Vt. 494.

*Washington.*—See Tull *v.* Nash, 141 Fed. 557, 73 C. C. A. 29.

<sup>18</sup> Thrall *v.* Wright, 38 Vt. 494. And see Warner *v.* Hoffman, 4 Edw. (N. Y.) 381.

<sup>19</sup> *England.*—Murray *v.* Barlee, 3 Myl. & K. 209.

*Arkansas.*—Oswalt *v.* Moore, 19 Ark. 257.

*Connecticut.*—Thresher *v.* Barry, 69 Conn. 470, 37 Atl. 1064.

*Kentucky.*—Coleman *v.* Wooley, 10 B. Mon. 320; McKee *v.* Sybert, 6 Ky. L. Rep. 519.

*Michigan.*—Wolcott *v.* Patterson, 100 Mich. 227, 58 N. W. 1006, 43 Am. St. Rep. 456. 24 L.R.A. 629; McCurdy *v.* Dillon, 135 Mich. 678, 98 N. W. 746.

*Mississippi.*—Porter *v.* Haley, 55 Miss. 66, 30 Am. Rep. 502; Travis *v.* Willis, 55 Miss. 566.

*Missouri.*—Crawford *v.* Love, 10 Mo. App. 583.

*New York.*—Owen *v.* Griffin, 2 Hun 670.

*Wisconsin.*—Leonard *v.* Rogan, 20 Wis. 540.

<sup>20</sup> In *Barnesley v. Powell*, Ambl. (Eng.) 102, the solicitor filed a petition, stating that he had expended large sums in prosecuting suits on behalf of B., who was a lunatic, against the defendant, P., and praying that he

is restrained of his liberty against his will, and without legal process, as an insane person, employs counsel to prosecute a writ of habeas corpus on his behalf, for the purpose of investigating the grounds and circumstances of the restraint, the counsel so employed will be entitled to recover a reasonable compensation for his services, provided they be rendered in good faith, and upon due inquiry into the causes of the confinement, and the condition of the party be such that an investigation before a judicial tribunal is proper.<sup>1</sup>

### § 416. Persons Acting in Representative Capacity. —

An attorney may, of course, be employed by one acting in a representative capacity;<sup>2</sup> and, when so employed, he is as much entitled to compensation as though he had been retained by a client acting in his own interest. Thus an attorney may be allowed remuneration for services rendered to guardians,<sup>3</sup> guardians *ad*

be allowed to enter up a judgment against the lunatic for such moneys, in order "that thereby he may have a lien on his real estate." Lord Hardwicke thought that the remedy of the petitioner was against the committee of the lunatic who had employed him, but said that the committee had a lien on the lunatic's estate, both real and personal, and that the court would assist the solicitor in declaring him to stand in the place of the committee; and a decree was so entered accordingly. Lord Hardwicke said: "If a solicitor prosecutes to a decree he has a lien on the estate recovered in the hands of the person recovering for his bills." This language, in so far as it intimated that a solicitor had a lien for his fees on real estate, was repudiated by the House of Lords in *Shaw v. Neale*, 6 H. L. Cas. (Eng.) 591.

<sup>1</sup> *Hallett v. Oakes*, 1 Cr. (Mass.) 296.

In *Matter of Southwick*, 1 Johns.

Ch. (N. Y.) 22. Chancellor Kent refers to the case of *Barnesley v. Powell*, Amb. (Eng.) 102, and to the similar case of *Ex p. Price*, 2 Ves. (Eng.) 407, and treats them as merely subrogating the solicitor to the rights of the committee, adding that the remedy of the solicitor is ordinarily, in such cases, in an action at law.

An action at law will not lie against the committee of a lunatic to recover compensation for professional services rendered by the plaintiff as an attorney in conducting the proceedings in lunacy; the court that has the final settlement of the committee's accounts has the exclusive control of such expenditures. But the estate in the hands of the committee is liable for such services. *Wier v. Myers*, 34 Pa. St. 377.

<sup>2</sup> See *supra*, § 136.

<sup>3</sup> *Fearn v. Young*, 10 Ves. Jr. (Eng.) 184; *Bignol v. Bignol*, 11 Ves. Jr. (Eng.) 328; *Crump v. Baker*, 18



*litem*,<sup>4</sup> executors and administrators,<sup>5</sup> assignees for creditors,<sup>6</sup> receivers,<sup>7</sup> trustees,<sup>8</sup> or anyone acting in any other such representative capacity. Whether the persons represented or their estates shall be bound by agreements entered into by their representatives for counsel fees, and to what extent, usually presents a question of local law. Generally, however, the attorney will be entitled to reasonable compensation to be determined, when judicial determination is necessary, by the rules obtaining in other cases.<sup>9</sup>

Ves. Jr. (Eng.) 285; *Stewart v. Hoare*, 2 Bro. C. C. (Eng.) 663; *Hunt v. McClanahan*, 1 Heisk. (Tenn.) 503; *Yourie v. Nelson*, 1 Tenn. Ch. 615.

*Presumption of Employment.*—In *Hilliard v. Carr*, 6 Ala. 557, it was held that, in the absence of proof to the contrary, it will be presumed that an attorney appearing for an infant was employed by the infant's guardian or next friend.

<sup>4</sup> *Jones v. Yore*, 142 Mo. 38, 43 S. W. 384; *Bowling v. Scales*, 1 Tenn. Ch. 618.

Where, in a suit in chancery involving the real property of infants, the chancellor, on account of the fact that the statutory guardian of the infants claims an adverse interest in the property, refuses to allow him to defend for the infants, and appoints a

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guardian *ad litem* for that purpose, who employs attorneys to represent him, and the latter conduct the litigation for the infants to a successful conclusion, the infants are liable for reasonable attorney's fees. *Owens v. Gunther*, 75 Ark. 37, 5 Ann. Cas. 130, 86 S. W. 851.

<sup>5</sup> *Brown v. Quinton*, 80 Kan. 44, 18 Ann. Cas. 290, 102 Pac. 242, 25 L.R.A. (N.S.) 71.

<sup>6</sup> *In re Schaller*, 10 Daly (N. Y.) 57.

<sup>7</sup> *Farmers' Loan & Trust Co. v. Mann*, 4 Robt. (N. Y.) 356.

<sup>8</sup> As to the compensation of attorneys for trustees in bankruptcy, see *infra*, § 62.

<sup>9</sup> *In re Becher*, 5 Pa. Co. Ct. 115.

As to the amount of compensation generally, see *infra*, § 439 et seq.

## CHAPTER XX.

### CONTRACTS FOR COMPENSATION.

#### *In General.*

- § 417. Right to Contract for Compensation.
- 418. Client's Capacity to Contract.
- 419. Construction of Contract.
- 420. Assignment of Contract.

#### *Contracts for Contingent Fees.*

- 421. Validity of Contracts for Contingent Fees Generally.
- 422. Contract for Part of Land in Litigation.
- 423. Happening of Contingency.
- 424. Manner of Effecting Contingency.
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#### *Matters Affecting Validity of Contracts Generally.*

- 428. Fairness.
- 429. Advice and Disclosure of Fact by Attorney.
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#### *Contracts in Contravention of Public Policy.*

- 433. In General.
- 434. As Dependent on Nature of Services Rendered.
- 435. Contracts Restricting Settlement by Client.
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- 437. Contracts Affecting Marital Relations.

#### *Recovery on Quantum Meruit for Services Performed under Void or Voidable Contracts.*

- 438. Generally.

*In General.*

§ 417. **Right to Contract for Compensation.**—It is well settled throughout the United States that an attorney may contract with his client for the rendition of professional services, and that such contract may fix the amount of the attorney's compensation therefor. In many jurisdictions this rule has been declared by statute. Indeed, the right of attorneys to compensation depends, in all cases, on a contract either express or implied.<sup>1</sup> A

**1 United States.**—*Wylie v. Cox*, 15 How. 415, 14 U. S. (L. ed.) 753; *Stanton v. Embrey*, 93 U. S. 548, 23 U. S. (L. ed.) 983; *Orr v. Brown*, 69 Fed. 216, 30 U. S. App. 405, 16 C. C. A. 197; *Tuttle v. Claffin*, 88 Fed. 122, 59 U. S. App. 602, 31 C. C. A. 419; *Ingersoll v. Coram*, 127 Fed. 418.

**Alabama.**—*Kidd v. Williams*, 132 Ala. 140, 31 So. 458, 56 L.R.A. 879.

**California.**—*Goad v. Hart*, 128 Cal. 197, 60 Pac. 761, 964; *Reynolds v. Soros Fruit Co.*, 133 Cal. 625, 66 Pac. 21.

**District of Columbia.**—*Stanton v. Haskin*, 1 MacArthur 558; *Whiting v. Davidge*, 23 App. Cas. 156.

**Illinois.**—*Morrison v. Smith*, 130 Ill. 304, 23 N. E. 241; *Franklin County v. Layman*, 145 Ill. 138, 33 N. E. 1094; *Dyrenforth v. Palmer, etc., Co.*, 240 Ill. 25, 88 N. E. 290.

**Indiana.**—*French v. Cunningham*, 149 Ind. 632, 49 N. E. 797; *Cordes v. Bailey*, 39 Ind. App. 83, 78 N. E. 678, 1060.

**Kentucky.**—*Cabell v. Cabell*, 1 Mete. 333; *Patterson v. Fleenor*, 89 S. W. 705, 28 Ky. L. Rep. 582.

**Louisiana.**—*McElrath v. Dupuy*, 2 La. Ann. 521.

**Maryland.**—*Neighbors v. Maulsby*, 41 Md. 478; *Etsel v. Duncan*, 112 Md. 346, 76 Atl. 493.

**Massachusetts.**—*Paul v. Wilbur*,

189 Mass. 48, 75 N. E. 63; *Bar Assoc. v. Hale*, 197 Mass. 423, 83 N. E. 885.

**Michigan.**—*Detroit v. Whittenmore*, 27 Mich. 280; *Dawson v. Peterson*, 110 Mich. 431, 68 N. W. 246; *Cavanaugh v. Robinson*, 138 Mich. 554, 101 N. W. 824.

**Minnesota.**—*Beals v. Wagener*, 47 Minn. 489, 50 N. W. 535.

**Mississippi.**—*Humphreys v. McLachlan*, 87 Miss. 532, 40 So. 151.

**Missouri.**—*Cosgrove v. Burton*, 104 Mo. App. 698, 78 S. W. 667; *Bond v. Sandford*, 134 Mo. App. 477, 114 S. W. 570; *Beagles v. Robertson*, 135 Mo. App. 306, 115 S. W. 1042.

**New Jersey.**—*Schomp v. Schenck*, 40 N. J. L. 195, 29 Am. Rep. 219; *Strong v. Mundy*, 52 N. J. Eq. 833, 31 Atl. 611; *Holloway v. Appelget*, 55 N. J. Eq. 583, 40 Atl. 27, 62 Am. St. Rep. 827.

**New York.**—*Adams v. Stevens*, 26 Wend. 451; *Wallis v. Loubat*, 2 Den. 207; *Fitch v. Gardenier*, 2 Keyes 516; *Deering v. Schreyer*, 171 N. Y. 451, 64 N. E. 179, *modifying* 58 App. Div. 322, 68 N. Y. S. 1015; *Clifford v. Braum*, 71 App. Div. 432, 75 N. Y. S. 856; *Bennett v. Donovan*, 83 App. Div. 95, 82 N. Y. S. 506; *Burke v. Baker*, 111 App. Div. 422, 97 N. Y. S. 768, *affirmed* 188 N. Y. 561, 80 N. E. 1033; *Weeks v. Gattell*, 125 App. Div. 402, 109 N. Y. S. 977;

similar rule prevails in at least some of the Canadian provinces.<sup>2</sup> The English law, however, prohibits counsel from entering into such contracts with their clients.<sup>3</sup>

An express contract for compensation when fairly and honestly entered into,<sup>4</sup> for a lawful purpose,<sup>5</sup> will control as between parties.<sup>6</sup>

*McCoy v. Gas Engine, etc., Co.*, 135 App. Div. 771, 119 N. Y. S. 864; *Flannery v. Geiger*, 46 Misc. 619, 92 N. Y. S. 785.

*Oklahoma*.—*Mellow v. Fulton*, 22 Okla. 636, 98 Pac. 911, 19 L.R.A. (N.S.) 960.

*Oregon*.—*Ladd v. Ferguson*, 9 Ore. 180; *Hamilton v. Holmes*, 48 Ore. 453, 87 Pac. 154.

*Pennsylvania*.—*McGee's Estate*, 205 Pa. St. 590, 55 Atl. 776.

*Tennessee*.—*Planters' Bank v. Hornberger*, 4 Coldw. 531; *Pate v. Maples*, 43 S. W. 740.

*Texas*.—*Croft v. Hicks*, 26 Tex. 383; *Bonner v. Green*, 6 Tex. Civ. App. 96, 24 S. W. 835; *American Cotton Co. v. Simmons*, 39 Tex. Civ. App. 189, 87 S. W. 842; *Hames v. Stroud*, 51 Tex. Civ. App. 562, 112 S. W. 775.

*Utah*.—*Croco v. Oregon, etc., R. Co.*, 18 Utah 321, 54 Pac. 985; *Potter v. Ajax Min. Co.*, 22 Utah 273, 61 Pac. 999.

*Virginia*.—*Yates v. Robertson*, 80 Va. 475; *Thomas v. Turner*, 87 Va. 1, 12 S. E. 149, 668.

*Washington*.—*Dennis v. Seattle First Nat. Bank*, 33 Wash. 161, 73 Pac. 1125; *Carson v. Fogg*, 34 Wash. 418, 76 Pac. 112; *Cain v. Moore*, 54 Wash. 627, 103 Pac. 1130.

*West Virginia*.—*Watts v. West Virginia So. R. Co.*, 48 W. Va. 262, 37 S. E. 700; *Camden v. McCoy*, 48 W. Va. 377, 37 S. E. 637; *Keenan*

*v. Scott*, 64 W. Va. 137, 61 S. E. 806.

*Wisconsin*.—*Vilas v. Bundy*, 106 Wis. 168, 81 N. W. 812.

<sup>2</sup> See *supra*, § 403. See also *Reg. v. Doutre*, 9 App. Cas. (Eng.) 745; *Paradis v. Bosse*, 21 Can. Sup. Ct. 419 (both of which cases were decided under the laws of the province of *Quebec*.)

<sup>3</sup> See *supra*, § 401.

<sup>4</sup> See *infra*, § 428.

<sup>5</sup> See *infra*, § 433.

<sup>6</sup> See *infra*, § 439.

*Right of Business Associate to Bind Attorney by Contract for Fees*.—In *Leavitt v. Chase*, 129 N. Y. 660, 29 N. E. 831, *affirming* 59 Super. Ct. 230, 13 N. Y. S. 883, the plaintiff, a lawyer, was jointly interested with H., who was not a lawyer, in making certain collections for the defendant; he also conducted various matters of litigation for the defendant which were not connected with the collections. In an action by him to recover for professional services, the defendant claimed that under an arrangement with H. it had been agreed that the plaintiff's fees were to be contingent upon a recovery. It was held that the fact that the plaintiff and H. were jointly interested in making the collections did not authorize the latter to bind the plaintiff by contract for his professional services in other matters; and, it having been found that H. had no authority

§ 418. **Client's Capacity to Contract.** — Under the rules applicable to contracts generally, a contract for professional services entered into between an attorney and one who was legally incapable of making such a contract, is void, and no recovery can be had thereon, though in some instances recovery may be had for beneficial services actually performed in good faith under such a contract: not on the contract, however, but by way of *quantum meruit*.<sup>7</sup> Thus a contract with an administrator is not binding on the estate, as the compensation of an administrator's attorney is a matter for the determination of the court.<sup>8</sup> An act of Congress provides that no agreement shall be made by any person with any Indian tribe, or individual Indian, in consideration of services for said Indians in reference to lands, moneys, etc., under treaties or laws of the United States, etc., unless in writing, and, among other requisites, approved by the Secretary of the Interior and the Commissioner of Indian Affairs;<sup>9</sup> and that no assignment of any such contract, or of any part thereof, shall be valid unless the names of the assignees, and their residences and occupations, are entered in writing thereon, together with the indorsed consent of the Secretary of the Interior and the Commissioner of Indian Affairs.<sup>10</sup>

§ 419. **Construction of Contract.** — The construction of contracts for compensation between attorney and client does not differ materially from the construction of contracts between other persons who sustain a fiduciary relation toward each other; thus the court will, if possible, adopt such construction as will give effect to the entire instrument.<sup>11</sup> But if the contract is ambiguous it

to make the contract and that it was not subsequently ratified by the plaintiff, he was entitled to recover.

<sup>7</sup> See *supra*, §§ 413-415. See also *Lacey v. Willson*, 83 Ind. 570.

<sup>8</sup> *Rickel v. Chicago, R. I. & P. R. Co.*, 112 Ia. 148, 83 N. W. 957.

<sup>9</sup> U. S. Rev. Stat. § 2103; 3 Fed. St. Ann. 367. See also *Gordon v. Gwydir*, 34 App. Cas. (D. C.) 508.

<sup>10</sup> U. S. Rev. Stat. § 2106; 3 Fed.

St. Ann. 370. See also *Gordon v. Gwydir*, 34 App. Cas. (D. C.) 508.

As to the apportionment of fees under contracts with Indians, see *infra*, § 469.

<sup>11</sup> *Pratt v. Kerns*, 123 Ill. App. 86; *Brackett v. Ostrander*, 126 App. Div. 529, 110 N. Y. S. 779; *Fisher v. Mylius*, 42 W. Va. 638, 26 S. E. 309.

"It is a settled and salutary principle that courts will follow the con-

will be construed favorably to the client,<sup>12</sup> even though he had the benefit of independent advice thereon.<sup>13</sup> Thus where the client was not able to read the contract, and was not informed of its provisions otherwise than by the attorney's explanations, the client is entitled to as favorable a construction as the language will permit.<sup>14</sup> Indeed, it has been well said that an attorney should have his agreements with clients so plain as not to require construction.<sup>15</sup> The courts will scrutinize with great care contracts between attorneys and clients, it being necessary to show that there was no fraud or mistake, and that the transaction was perfectly understood by the weaker party.<sup>16</sup>

When the terms and language of the contract are ascertained, and it contains no obscure technical phrases or latent ambiguities which render its meaning uncertain or doubtful, its interpretation is for the court;<sup>17</sup> but where there is ambiguity, practical construction and parol explanation are admissible as in other cases.<sup>18</sup>

A contract for professional services between a citizen and a

struction that the parties themselves, by their acts, have put upon their own contracts." Louisville, etc., R. Co., *v.* Reynolds, 118 Ind. 170, 20 N. E. 711.

In the construction of a contract between an attorney and client, the rule of law which casts upon the attorney the burden to show that the contract was made with the full understanding of the situation at the time does not apply, being limited to the enforcement of such contract. Willoughby *v.* Mackall, 1 App. Cas. (D. C.) 411, 417.

<sup>12</sup> Funk *v.* Mohr, 185 Ill. 395, 57 N. E. 2, *affirming* 85 Ill. App. 97; Burling *v.* King, 16 How. Pr. (N. Y.) 152; Hitchings *v.* Van Brunt, 5 Abb. Pr. N. S. (N. Y.) 272; Mellyaine *v.* Steinson, 90 App. Div. 77, 85 N. Y. S. 889; Brackett *v.* Ostrander, 126 App. Div. 529, 110 N. Y. S. 779; Butts *v.* Carey, 143 App. Div. 356, 128 N. Y. S. 533; Samuels *v.* Simp-

son, 144 App. Div. 466, 129 N. Y. S. 534; Matter of Hawke, 148 App. Div. 326, 133 N. Y. S. 23, *affirmed* 204 N. Y. 671, 98 N. E. 1097; McCoy *v.* Gas Engine & Power Co., 152 App. Div. 642, 137 N. Y. S. 591.

<sup>13</sup> Samuels *v.* Simpson, 144 App. Div. 466, 129 N. Y. S. 534.

<sup>14</sup> Harkavy *v.* Zisman, 96 N. Y. S. 214.

<sup>15</sup> Per Miller, J., in Samuels *v.* Simpson, 144 App. Div. 466, 129 N. Y. S. 534.

<sup>16</sup> Eysaman *v.* Nelson, 79 Misc. 304, 140 N. Y. S. 183.

<sup>17</sup> Serat *v.* Smith, 61 Hun 36, 15 N. Y. S. 875; Fulton *v.* Western Stove Mfg. Co., (Tex.) 45 S. W. 1035; Cain *v.* Moore, 54 Wash. 627, 103 Pac. 1130.

<sup>18</sup> Russell *v.* Young, 94 Fed. 45, 36 C. C. A. 71; Funk *v.* Mohr, 185 Ill. 395, 57 N. E. 2, *affirming* 85 Ill. App. 97; Smidt *v.* Dessar, 13 Misc. 254, 34 N. Y. S. 158, 68 N. Y. St. Rep. 205.

foreign attorney will, in the absence of a special agreement as to compensation, be governed by the law of the country in which the contract was made and intended to be performed.<sup>19</sup>

The fairness, and such other matters as affect the validity of the contract, will be considered later.<sup>20</sup>

**§ 420. Assignment of Contract.** — An attorney who has entered into a contract for the rendition of professional services cannot, while the contract remains executory, assign it to another attorney without the consent of the client. The reason of this rule is that the contract is, in its nature, one which involves the client's undoubted right to select those who shall serve him as counsel,<sup>1</sup> and that, under the rule heretofore stated, an attorney has no implied power to delegate his authority to act for his client.<sup>2</sup> But where the contract has been fully performed on the part of the attorney, and all that remains for the client to do is to pay the agreed compensation, the contract may be assigned merely as the evidence of the indebtedness; and, in such case, the assignee can recover from the client,<sup>3</sup> though a part of an entire and indivisible claim cannot be so assigned.<sup>4</sup> So, also, the unauthorized assignment of the contract may be ratified by the client, and in this way made effective.<sup>5</sup>

*Contracts for Contingent Fees.*

**§ 421. Validity of Contracts for Contingent Fees Generally.** — Under the general rule prevailing in the United States it is lawful for an attorney to enter into a contract with his client for the rendition of professional services whereby the compensation of the attorney is made contingent on success, and payable from the proceeds of the litigation, or other legal business, in-

<sup>19</sup> Dawson v. Peterson, 110 Mich. 431, 68 N. W. 246.

<sup>20</sup> See *infra*, § 428 et seq.

<sup>1</sup> Taylor v. Black Diamond Coal Min. Co., 86 Cal. 589, 25 Pac. 51; Hilton v. Crooker, 30 Neb. 707, 47 N. W. 3.

<sup>2</sup> See *supra*, § 210.

<sup>3</sup> Taylor v. Black Diamond Coal Min. Co., 86 Cal. 589, 25 Pac. 51; Hilton v. Crooker, 30 Neb. 707, 47 N. W. 3.

<sup>4</sup> Mulford v. Hodges, 10 Hun (N. Y.) 79.

<sup>5</sup> See *supra*, §§ 211-214.

trusted to the attorney's care.<sup>6</sup> But it is essential that such con-

<sup>6</sup>*United States*.—*Wylie v. Coxe*, 15 How. 415, 14 U. S. (L. ed.) 753; *Wright v. Tebbitts*, 91 U. S. 252, 23 U. S. (L. ed.) 320; *Stanton v. Embrey*, 93 U. S. 548, 23 U. S. (L. ed.) 983; *McPherson v. Cox*, 96 U. S. 404, 24 U. S. (L. ed.) 746; *Taylor v. Bemiss*, 110 U. S. 42, 3 S. Ct. 441, 28 U. S. (L. ed.) 64; *Ball v. Hallsell*, 161 U. S. 80, 16 S. Ct. 554, 40 U. S. (L. ed.) 622; *Ex p. Plitt*, 2 Wall. Jr. (C. C.) 453, 19 Fed. Cas. No. 11,228; *Fletcher v. McArthur*, 117 Fed. 393, 54 C. C. A. 567; *Barcus v. Sherwood*, 136 Fed. 184, 69 C. C. A. 200, *affirming* 130 Fed. 364; *Phillips v. Louisville, etc., R. Co.*, 153 Fed. 795; *Cain v. Hockensmith, etc., Co.*, 157 Fed. 992; *Globe Works v. U. S.*, 45 Ct. Cl. 497.

*Arkansas*.—*Lytle v. State*, 17 Ark. 608; *Brodie v. Watkins*, 33 Ark. 545, 34 Am. Rep. 49; *Jacks v. Thweatt*, 39 Ark. 340; *Davis v. Webber*, 66 Ark. 190, 49 S. W. 822, 74 Am. St. Rep. 81, 45 L.R.A. 196.

*Colorado*.—*Hazeltime v. Brockway*, 26 Colo. 291, 57 Pac. 1077.

*District of Columbia*.—*Stanton v. Haskin*, 1 MacArthur 558.

*Georgia*.—*Moses v. Bagley*, 55 Ga. 283.

*Illinois*.—*Newkirk v. Cone*, 18 Ill. 449; *Thompson v. Reynolds*, 73 Ill. 11; *West Chicago Park Com'rs v. Coleman*, 108 Ill. 591; *Geer v. Frank*, 179 Ill. 570, 53 N. E. 965, 45 L.R.A. 110; *Robinson v. Sharp*, 201 Ill. 86, 66 N. E. 299; *Dunne v. Herrick*, 37 Ill. App. 182; *Neal v. Franklin County*, 43 Ill. App. 267.

*Indiana*.—*Whinery v. Brown*, 36 Ind. App. 276, 75 N. E. 605.

*Iowa*.—*McDonald v. Chicago, etc.,*

*R. Co.*, 29 Ia. 174; *Jewel v. Neidy*, 61 Ia. 299, 16 N. W. 141; *Larned v. Dubuque*, 86 Ia. 166, 53 N. W. 105; *Dunham v. Bently*, 103 Ia. 136, 72 N. W. 437; *Rickel v. Chicago, etc., R. Co.*, 112 Ia. 148, 83 N. W. 957; *Graham v. Dubuque, etc., Works*, 138 Ia. 456, 114 N. W. 619, 15 L.R.A. (N.S.) 729.

*Kansas*.—*Stevens v. Sheriff*, 76 Kan. 124, 90 Pac. 799, 11 L.R.A. (N.S.) 1153.

*Louisiana*.—*Clay v. Ballard*, 9 Rob. 308, 41 Am. Dec. 328; *Andriae v. Richardson*, 125 La. 883, 51 So. 1024 (decided in accordance with act of 1906), *practically overruling* *Mazureau v. Morgan*, 25 La. Ann. 281 (decided under act of 1808).

*Maryland*.—*Wheeler v. Harrison*, 94 Md. 147, 50 Atl. 523.

*Michigan*.—*Willey v. Crane*, 63 Mich. 720, 30 N. W. 327; *Millard v. Jordan*, 76 Mich. 131, 42 N. W. 1085; *Denman v. Johnston*, 85 Mich. 389, 48 N. W. 565.

*Minnesota*.—*Canty v. Lattner*, 31 Minn. 239, 17 N. W. 385; *Moyer v. Cantieny*, 41 Minn. 242, 42 N. W. 1060; *Gammons v. Johnson*, 76 Minn. 76, 78 N. W. 1035.

*Mississippi*.—*Humphreys v. McLachlan*, 87 Miss. 532, 40 So. 151.

*Missouri*.—*Lippscomb v. Adams*, 193 Mo. 530, 91 S. W. 1046, 112 Am. St. Rep. 500; *Curtis v. Metropolitan St. R. Co.*, 125 Mo. App. 369, 102 S. W. 62; *Beagles v. Robertson*, 135 Mo. App. 306, 115 S. W. 1042; *Taylor v. Perkins*, 157 S. W. 122.

*Nebraska*.—*Stroemer v. Van Orsdel*, 74 Neb. 132, 103 N. W. 1053, 121 Am. St. Rep. 713, 4 L.R.A. (N.S.) 212, *affirmed on rehearing* 74 Neb.



143, 107 N. W. 125, 121 Am. St. Rep. 723, 4 L.R.A.(N.S.) 218.

*New Jersey*.—Terney *v.* Wilson, 45 N. J. L. 282; Hassell *v.* Van Houten, 39 N. J. Eq. 105.

*New York*.—Brown *v.* New York, 9 Hun 595; Browne *v.* West, 9 App. Div. 135, 41 N. Y. S. 146; Morehouse *v.* Brooklyn Heights R. Co., 123 App. Div. 680, 108 N. Y. S. 152, *affirmed* 195 N. Y. 537, 88 N. E. 1126; In re Flannery, 150 App. Div. 369, 135 N. Y. S. 612; Wilde *v.* Joel, 6 Duer 671, 15 How. Pr. 329; Fox *v.* Fox, 24 How. Pr. 409; Fitch *v.* Gardenier, 2 Keyes 516; Fogerty *v.* Jordan, 2 Robt. 319; Easton *v.* Smith, 1 E. D. Smith 318; Rooney *v.* Second Ave. R. Co., 18 N. Y. 368; Hitchings *v.* Van Brunt, 38 N. Y. 335, 5 Abb. Pr. N. S. 272; Sussdorff *v.* Schmidt, 55 N. Y. 320; Coughlin *v.* New York Cent., etc., R. Co., 71 N. Y. 443, 27 Am. Rep. 75, *reversing* 8 Hun 136; Wetmore *v.* Hegeman, 88 N. Y. 69, *affirming* 12 N. Y. Wkly. Dig. 403; Fowler *v.* Callan, 102 N. Y. 395, 7 N. E. 169, *reversing* 4 Civ. Pro. 413, 12 Daly 263; Matter of Fitzsimmons, 174 N. Y. 15, 66 N. E. 554.

*North Dakota*.—Woods *v.* Walsh, 7 N. D. 376, 75 N. W. 767.

*Ohio*.—Weakly *v.* Hall, 13 Ohio 167, 42 Am. Dec. 194; Stewart *v.* Welch, 41 Ohio St. 483; Reece *v.* Kyle, 49 Ohio St. 475, 31 N. E. 747, 16 L.R.A. 723; Hudson *v.* Sanders, 10 Ohio Cir. Dec. 342, 19 Ohio Cir. Ct. 615.

*Oregon*.—Dahms *v.* Sears, 13 Ore. 48, 11 Pac. 891; Hamilton *v.* Holmes, 48 Ore. 462, 87 Pac. 154; Stearns *v.* Wellenberg, 51 Ore. 88, 92 Pac. 1079.

*Pennsylvania*.—Boulden *v.* Hebel, 17 S. & R. 312; Strohecker *v.* Hoffman, 19 Pa. St. 227; Patten *v.* Wil-

son, 34 Pa. St. 299; Chester County *v.* Barber, 97 Pa. St. 455; Perry *v.* Dicken, 105 Pa. St. 83, 51 Am. Rep. 181; Mumma's Appeal, 127 Pa. St. 474, 18 Atl. 6; Fellows *v.* Smith, 190 Pa. St. 301, 42 Atl. 678; Williams *v.* Philadelphia, 208 Pa. St. 282, 57 Atl. 578; Fenn *v.* McCarrell, 208 Pa. St. 615, 57 Atl. 1108; Dickerson *v.* Pyle, 4 Phila. 259, 18 Leg. Int. 37; Filon's Estate, 7 Pa. Dist. Ct. 316.

*Texas*.—Wheeler *v.* Riviere, 49 S. W. 697; Lynch *v.* Munson, 59 S. W. 603.

*Utah*.—Croco *v.* Oregon, etc., R. Co., 18 Utah 311, 54 Pac. 985, 44 L.R.A. 285.

*Vermont*.—In re Aldrich, 86 Atl. 801.

*Virginia*.—Nickels *v.* Kane, 82 Va. 309; McDonald *v.* Logan, 34 S. E. 490.

*Washington*.—Schultheis *v.* Nash, 27 Wash. 250, 67 Pac. 707.

*West Virginia*.—Polsley *v.* Anderson, 7 W. Va. 202, 23 Am. Rep. 613; Graham *v.* Graham, 10 W. Va. 355; Anderson *v.* Caraway, 27 W. Va. 385; Lewis *v.* Broun, 36 W. Va. 1, 14 S. E. 444; Crumlish *v.* Shenandoah, etc., R. Co., 40 W. Va. 627, 22 S. E. 90; Fisher *v.* Mylius, 42 W. Va. 638, 26 S. E. 309; Door *v.* Camden, 55 W. Va. 226, 46 S. E. 1014, 65 L.R.A. 348.

*Wisconsin*.—Ryan *v.* Martin, 16 Wis. 59; Allard *v.* Lamirande, 29 Wis. 502; Kusterer *v.* Beaver Dam, 56 Wis. 475, 14 N. W. 617, 43 Am. Rep. 725.

*Contra in England*.—Hilton *v.* Woods, L. R. 4 Eq. 432, 36 L. J. Ch. 491, 16 L. T. N. S. 736. See also In re Masters, Hurl. & W. 348; Strange *v.* Brennan, 15 Sim. 346, *affirmed* in

tracts are fairly and honestly entered into,<sup>7</sup> and free from the taint of illegality.<sup>8</sup>

The old notion that such contracts were champertous, prevails no longer;<sup>9</sup> although in some jurisdictions the contract, to avoid being champertous, must show the creation of an indebtedness by the client for the counsel fees thus incurred, even though he loses his suit, or, rather, it must not appear that, in the event of losing the suit, the attorney's services are to be gratuitous;<sup>10</sup> nor must it appear that the attorney agrees to pay the costs and expenses of the litigation undertaken by him;<sup>11</sup> but where such requirements are complied with, contingent fees may be contracted for in these jurisdictions as well as elsewhere.<sup>12</sup>

In the early days it was thought that to contract for a contingent fee was unlawful, but that idea has long since been discarded in this country. Such contracts are as much for the benefit of the client as for the attorney, because if the client has a meritorious cause of action, but no means with which to pay for legal services, unless he can lawfully contract for a contingent fee to be paid out of the proceeds of the litigation, he will necessarily be deprived of his remedy—a result which the law does not desire, and

2 Coop. t. Cot. 1, 15 L. J. Ch. 389, 10 Jur. 649; Earle v. Hopwood, 9 C. B. N. S. 566, 99 E. C. L. 566 30 L. J. C. Pl. 217, 7 Jur. N. S. 775, 3 L. T. N. S. 670, 9 W. R. 272. And see *supra*, § 401.

<sup>7</sup> See *infra*, § 428.

<sup>8</sup> See *infra*, § 433.

*Attorney also Witness.*—A contract by an attorney to render services for a contingent fee may be valid, although it is understood that the attorney will be an indispensable witness on the trial of his client's case. Perry v. Dicken, 105 Pa. St. 83, 51 Am. Rep. 181.

<sup>9</sup> See *supra*, § 386.

<sup>10</sup> See *supra*, § 388.

<sup>11</sup> See *supra*, § 389.

<sup>12</sup> *Alabama.*—Ware v. Russell, 70 Ala. 174, 45 Am. Rep. 82; Price v. Car-

ney, 75 Ala. 552; German v. Brown, 145 Ala. 364, 39 So. 742; Troy v. Hall, 157 Ala. 592, 47 So. 1035.

*Indiana.*—Tron v. Lewis, 31 Ind. App. 178, 66 N. E. 490; Whinnery v. Brown, 36 Ind. App. 276, 75 N. E. 605.

*Kentucky.*—Wilhite v. Roberts, 4 Dana 172; Evans v. Bell, 6 Dana 479; Leslie v. York, 112 Ky. 712, 66 S. W. 751; Schmitz v. South Covington, etc., R. Co., 131 Ky. 207, 114 S. W. 1197, 22 L.R.A.(N.S.) 776.

*Massachusetts.*—Scott v. Harmon, 109 Mass. 237, 12 Am. Rep. 685; Blaisdell v. Ahern, 144 Mass. 393, 11 N. E. 681, 59 Am. Rep. 99; Hadlock v. Brooks, 178 Mass. 425, 59 N. E. 1009.

*Nebraska.*—See Omaha, etc., R. Co. v. Brady, 39 Neb. 49, 57 N. W. 767.

which certainly is inconsistent with its tenets.<sup>13</sup> Of course, the lawyer could always render assistance to indigent persons without fear of offending against the law of champerty and maintenance, providing he did so gratuitously;<sup>14</sup> but now that the practice of law is recognized to be an occupation which is followed not alone for honor, but as well for profit, the reason of the old rule falls, and the rule necessarily falls with it. So, it may well be that one who is not indigent may wisely submit his business to counsel on the basis of a contingent fee, and there is no good reason for considering the transaction illegal, especially in view of the fact that such contracts, as well as all other dealings between attorney and client, are always subject to scrutiny by the court.<sup>15</sup>

§ 422. **Contract for Part of Land in Litigation.** — Where an attorney is retained in a suit brought for the recovery of land, whether for the prosecution or defense thereof, it is now well settled that he may lawfully contract with his client for a fee contingent upon success,<sup>16</sup> and that such fee may consist of a share of the land in litigation;<sup>17</sup> and where the contract has been performed by the attorney, its specific performance may be enforced against the client.<sup>18</sup> Contracts of this character are not now considered champertous.<sup>19</sup> Nor can such a contract be said to be unreasonable because the value of the land has enhanced

<sup>13</sup> *Lipsecomb v. Adams*, 193 Mo. 530, 91 S. W. 1046, 112 Am. St. Rep. 500.

<sup>14</sup> See *supra*, § 393.

<sup>15</sup> See *infra*, § 428 et seq. And see *supra*, 152-163.

<sup>16</sup> *Tull v. Nash*, 141 Fed. 557, 73 C. C. A. 29; *Carson v. Fogg*, 34 Wash. 448, 76 Pac. 112.

<sup>17</sup> *California*.—*Ballard v. Carr*, 48 Cal. 74; *Adams v. Hopkins*, 69 Pac. 228, *affirmed* 73 Pac. 971.

*Kentucky*.—*Smith v. Thompson*, 7 B. Mon. 305; *Corbin v. Mulligan*, 1 Bush 297.

*Missouri*.—*Lipsecomb v. Adams*, 193 Mo. 530, 91 S. W. 1046, 112 Am. St. Rep. 500; *Duke v. Harper*, 8 Mo. App. 296.

*Montana*.—*Myers v. Bender*, 46 Mont. 497, 129 Pac. 330.

*New Jersey*.—*Adams v. Schmitt*, 68 N. J. Eq. 168, 60 Atl. 345.

*Texas*.—*Carlisle v. Gibbs*, 44 Tex. Civ. App. 189, 98 S. W. 192; *Hart v. Hunter*, 52 Tex. Civ. App. 75, 114 S. W. 882; *Cahill v. Dickson*, 77 S. W. 281.

<sup>18</sup> *Howard v. Throckmorton*, 48 Cal. 482; *Deering v. Schreyer*, 171 N. Y. 451, 64 N. E. 179, *reversing* 58 App. Div. 322, 68 N. Y. S. 1015; *Martin v. Platt*, 5 N. Y. St. Rep. 284; *Carson v. Fogg*, 34 Wash. 448, 76 Pac. 112.

<sup>19</sup> See *supra*, § 387.

since the contract was made.<sup>20</sup> So, where the client sells the land which was recovered for him by an attorney under an agreement which entitled him to a share thereof, the attorney is entitled to be paid from the proceeds if they can be reached.<sup>1</sup>

§ 423. **Happening of Contingency.**—The compensation agreed upon in contract for contingent fees does not become due until the contingency happens—that is, until the attorney does what he agreed to do.<sup>2</sup> Thus where an agreement between attorney and client binds the attorney, in consideration of a contingent fee, to obtain for his client's claim a security "beyond cavil," the agreement will be strictly construed, and the attorney will be required to obtain security, which, so far as regards safety, is as good as money.<sup>3</sup> Where an attorney agreed with a county, against which mandamus proceedings were pending to compel the issue of certain bonds, to defend the suits relating thereto for a stipulated fee, and for a further sum to be paid "in the event the county shall not be obliged to issue said bonds," or in the event of a compromise without the attorney's consent, and to be paid when "the validity of the bonds is determined in favor of said county;" it was held that the contingency upon which the fee depended was not affected by a decision, in another case, that similar bonds, already issued, were invalid.<sup>4</sup> And where the plaintiff in an action for divorce, in order to procure her attorney's consent to the substitution of another attorney in his stead, signed a stipulation that, in the event that alimony theretofore

<sup>20</sup> *Howard v. Throckmorton*, 48 Cal. 482; *Smith v. Thompson*, 7 B. Mon. (Ky.) 305.

<sup>1</sup> *Hand v. Savannah, etc., R. Co.*, 21 S. C. 162.

<sup>2</sup> *Alabama*.—*Cheney v. Kelly*, 95 Ala. 163, 10 So. 664.

*Kentucky*.—*Evans v. Bell*, 6 Dana 479; *Hargis v. Louisville Gas Co.*, 22 S. W. 85; *Fisk v. Snyder*, 4 Ky. L. Rep. 716.

*Montana*.—*Foley v. Kleinschmidt*, 28 Mont. 198, 72 Pac. 432.

*New York*.—*Haire v. Hughes*, 197

N. Y. 514, 90 N. E. 1159, *affirming* 127 App. Div. 530, 111 N. Y. S. 892; *Wilson v. Horton*, 140 N. Y. S. 980.

*North Carolina*.—*Johnston v. Cutchin*, 133 N. C. 119, 45 S. E. 522.

*Pennsylvania*.—*Dickerson v. Pyle*, 4 Phila. 259, 18 Leg. Int. 37.

*Texas*.—*Shaw v. Threadgill*, 53 Tex. Civ. App. 254, 115 S. W. 671.

<sup>3</sup> *Dickerson v. Pyle*, 4 Phila. (Pa.) 259, 18 Leg. Int. 37.

<sup>4</sup> *Richland County v. Millard*, 9 Ill. App. 396.

awarded was collected from the defendant, a certain sum should be paid out of it to the former attorney; it was held that such payment was contingent on the collection of the alimony as awarded, and could not be enforced where the amount thereof was reduced by an order subsequently procured by the defendant.<sup>5</sup> So, where an attorney agrees to collect a certain claim, and is to be paid out of the recovery and not otherwise, he is entitled to no compensation under the contract until he actually collects the claim.<sup>6</sup> And where an attorney informs his client that a claim, the collection of which he has undertaken on a contingent fee, is hopeless, he cannot recover compensation from the client who, thereafter, collects the claim personally.<sup>7</sup>

§ 424. **Manner of Effecting Contingency.** — The manner in which the desired result is brought about is immaterial so long as it is a lawful one, unless the contract provides for performance in some particular way; thus it is not essential that there should be a trial or other litigation; indeed, contracts for contingent fees frequently provide for the payment of the fee upon the settlement of the action or claim.<sup>8</sup> Nor does the fact that a matter is

<sup>5</sup> *Bittiner v. Goldman*, 20 Misc. 330, 45 N. Y. S. 953.

<sup>6</sup> *Georgia*.—*Moses v. Bagley*, 55 Ga. 283.

*Illinois*.—*Fraatz v. Garrison*, 83 Ill. 60.

*Indiana*.—*Seobey v. Ross*, 5 Ind. 445.

*Louisiana*.—*Shepherd v. Dickson*, 38 La. Ann. 741.

*New York*.—*Mills v. Fox*, 4 E. D. Smith 220; *Bittiner v. Goldman*, 20 Misc. 330, 45 N. Y. S. 953; *Mains v. Gethen*, 111 N. Y. S. 598; *Phelps v. Emery*, 24 N. Y. Wkly. Dig. 541.

*North Carolina*.—*Leach v. Strange*, 10 N. C. 601.

<sup>7</sup> *Simrall v. Morton*, 12 S. W. 185, 12 Ky. L. Rep. 31; *Mains v. Gethen*, 111 N. Y. S. 598. See also *Leach v. Strange*, 10 N. C. 601.

<sup>8</sup> *State v. Barrow*, Mann. Unrep.

*Cas. (La.)* 332; *Stoutenburgh v. Fleer*, 87 N. Y. S. 504.

Where M., against whom judgment had been rendered for the recovery of land, employed attorneys to regain the land for him, agreeing to pay them \$200 for their services, but stipulating that they were to receive nothing unless they regained the land for him, and placed in their hands a refunding bond by which C. was obligated to him for the loss of the land, the attorneys having procured C. to purchase the land and convey it to M. in discharge of his obligation, the contingency has happened upon which the attorneys were to be entitled to the stipulated fee. *Me-Intosh v. Baeh*, 110 Ky. 701, 62 S. W. 515, 23 Ky. L. Rep. 74.

And see *infra*, § 525.

conducted successfully without trial or other litigation, warrant the court in disregarding the contract and reducing the fee stipulated for therein.<sup>9</sup> Thus where, in an action of ejectment, the defendant's attorneys answered by a general denial, and directed him to procure an abstract of title, and in so doing the defendant learned of and purchased an outstanding title, and the plaintiff thereafter dismissed the suit without trial, it was held that the defendant's attorneys had "gained the suit."<sup>10</sup> So, under a contract to pay an attorney a percentage "on all amounts collected," the attorney is entitled to his percentage, although the claim is paid without his interference.<sup>11</sup> It has been held that the condition in a contract to pay an attorney in a will contest a stipulated fee "in case the will is defeated and our clients get their shares" is satisfied where the contest and the attorney's services result in a compromise agreement by which the will, which, as propounded, disinherited such clients, was so qualified in probate that they received a larger proportion of the estate than if the testator had died intestate.<sup>12</sup>

**§ 425. Creation of Equitable Assignment.** — Where a client assigns to his attorney, in payment of the services to be performed by him, an interest in the subject-matter of the litigation, the transaction will, as a general rule, be upheld as an equitable assignment, and may be enforced as such.<sup>13</sup> So, in some jurisdic-

<sup>9</sup> *Murray v. Waring Hat Mfg. Co.*, 142 App. Div. 514, 127 N. Y. S. 78.

<sup>10</sup> *Moss v. Richie*, 50 Mo. App. 75.

<sup>11</sup> *Jacks v. Thweatt*, 39 Ark. 340.

And see *supra*, § 528.

<sup>12</sup> *Ingersoll v. Coram*, 211 U. S. 335, 29 S. Ct. 92, 53 U. S. (L. ed.) 208, reversing 148 Fed. 169, 78 C. C. A. 303, 127 Fed. 418.

<sup>13</sup> *United States*.—*Cain v. Hoeken-smith Wheel & Car. Co.*, 157 Fed. 992.

*California*.—*Hoffman v. Vallejo*, 45 Cal. 564; *Goad v. Hart*, 128 Cal. 197, 60 Pac. 761, 964.

*Indiana*.—*Blakey v. New York L.*

*Ins. Co.*, 28 Ind. App. 428, 63 N. E. 47.

*Kansas*.—*Aultman v. Waddle*, 40 Kan. 202, 19 Pac. 730.

*Michigan*.—*Weeks v. Wayne Circuit Judges*, 73 Mich. 256, 41 N. W. 269.

*New York*.—*Fairbanks v. Sargent*, 104 N. Y. 108, 9 N. E. 870, 58 Am. Rep. 490; *Deering v. Schreyer*, 171 N. Y. 451, 64 N. E. 179, modifying 58 App. Div. 322, 68 N. Y. S. 1015; *Bennett v. Donovan*, 83 App. Div. 95, 82 N. Y. S. 506; *Flannery v. Geiger*, 46 Misc. 619, 92 N. Y. S. 785.

*Ohio*.—*Pittsburg, etc., Co. v. Volkert*, 58 Ohio St. 362, 50 N. E. 924;

tions, an agreement that the attorney shall receive a specific sum, or a certain percentage, to be paid out of the amount recovered, will be deemed to constitute an equitable assignment in favor of the attorney.<sup>14</sup> An agreement that the attorney shall have a lien upon the sum to be recovered for a specified amount, as compensation for his services, constitutes a valid equitable assignment, which attaches to the judgment as soon as it is entered.<sup>15</sup> So, where the proofs of a debt are placed with an attorney, with instructions to collect the same, and retain out of the proceeds the amount due him as fees for other work, the transaction is an equitable assignment, though the amount thereof was not at the time agreed upon.<sup>16</sup> In such cases the attorney's right is paramount to that of a subsequent assignee, or attaching creditor, of the client.<sup>17</sup> There can, of course, be no equitable assignment where the terms of the contract preclude the idea that

*Pennsylvania Co. v. Thatcher*, 78 Ohio St. 175, 85 N. E. 55.

*Oregon*.—*Ladd v. Ferguson*, 9 Ore. 180 (assignment of costs and disbursements); *Alexander v. Mumroe*, 54 Ore. 500, 101 Pae. 903, 103 Pae. 514, 135 Am. St. Rep. 840.

*Pennsylvania*.—*Com. v. Terry*, 11 Pa. Super. Ct. 547.

*Texas*.—*Galveston, etc., R. Co. v. Ginther*, 96 Tex. 295, 72 S. W. 166, *affirming* 30 Tex. Civ. App. 161, 70 S. W. 96; *Texas Cent. R. Co. v. Andrews*, 28 Tex. Civ. App. 477, 67 S. W. 923.

<sup>14</sup> *United States*.—*Cain v. Hocken-smith Wheel, etc., Co.*, 157 Fed. 992.

*Minnesota*.—*Canty v. Latterner*, 31 Minn. 239, 17 N. W. 385.

*New York*.—*Fairbanks v. Sargent*, 104 N. Y. 108, 9 N. E. 870, 58 Am. Rep. 490; *Holmes v. Evans*, 129 N. Y. 140, 29 N. E. 233, *affirming* 59 Super. Ct. 136, 13 N. Y. S. 614; *Brown v. New York*, 11 Hun 21; *Bennett v. Donovan*, 83 App. Div. 95, 82 N. Y. S. 506.

*Pennsylvania*.—*Hagemann's Estate*, 5 Pa. Co. Ct. 576.

*Texas*.—*Texas Cent. R. Co. v. Andrews*, 28 Tex. Civ. App. 477, 67 S. W. 923.

<sup>15</sup> *Terney v. Wilson*, 45 N. J. L. 282. And see *infra*, § 634, as to the right of a lien in such cases.

<sup>16</sup> *Milmo Nat. Bank v. Convery*, 8 Tex. Civ. App. 181, 27 S. W. 828.

<sup>17</sup> *Connecticut*.—*Ripley v. Bull*, 19 Conn. 53.

*Florida*.—*Sammis v. L'Engle*, 19 Fla. 800.

*New Jersey*.—*Terney v. Wilson*, 45 N. J. L. 282.

*New York*.—*Jaeger v. Koenig*, 33 Misc. 82, 67 N. Y. S. 172, *reversing* 32 Misc. 244, 65 N. Y. S. 795; *Plan-nery v. Geiger*, 46 Misc. 619, 92 N. Y. S. 785.

*Pennsylvania*.—*Patten v. Wilson*, 34 Pa. St. 299.

*Texas*.—*Milmo Nat. Bank v. Con-very*, 8 Tex. Civ. App. 181, 27 S. W. 828.

The rule stated in the text forms

it was so intended,<sup>18</sup> and in some states an agreement for contingent fees will not operate as an equitable assignment without an express stipulation to that effect.<sup>19</sup> In several jurisdictions it is held that an executory contract for the payment to an attorney of a specified percentage of such amount as may be recovered does not give to the attorney any interest whatever, in law or in equity, in the cause of action, either by way of assignment or lien.<sup>20</sup>

**§ 426. Creation of Interest in Subject-Matter of Litigation.** — The general rule is that a contract whereby a client agrees to pay, or assigns to his attorney, a specified percentage of such amount as may be recovered, is executory merely, and gives to the attorney neither a legal nor an equitable interest in the cause of action;<sup>1</sup> and this is especially true of actions for personal injury.<sup>2</sup>

an exception to the general principle regarding the assignment of choses in action, and is limited to the assignment of a debt or judgment by the creditor to his attorney, as security for his services and disbursements in a suit brought upon the debt, or in which the judgment was rendered. *Ripley v. Bull*, 19 Conn. 53.

An assignment of a chose in action is wholly ineffectual as against the debtor, in the absence of notice to him of the assignment, or knowledge of facts in relation thereto sufficient to put him upon inquiry. Until the debtor has notice of such assignment he may deal with the assignor as though no assignment had ever been made. *Nielsen v. Albert Lea*, 91 Minn. 388, 392, 98 N. W. 195, 197.

<sup>18</sup> *Woods v. Dickinson*, 7 Mackey (D. C.) 301.

<sup>19</sup> *Stearns v. Wollenberg*, 51 Ore. 88, 92 Pac. 1079, 14 L.R.A.(N.S.) 1095; *McRae v. Warehime*, 49 Wash. 194, 94 Pac. 924; *Plummer v. Great*

*Northern R. Co.*, 60 Wash. 214, 110 Pac. 989, 31 L.R.A.(N.S.) 1215.

<sup>20</sup> *Story v. Hull*, 143 Ill. 506, 32 N. E. 265; *Cameron v. Boeger*, 200 Ill. 84, 65 N. E. 690, 93 Am. St. Rep. 165, *affirming* 102 Ill. App. 649; *Weller v. Jersey City, etc.*, R. Co., 68 N. J. Eq. 659, 6 Ann. Cas. 442, 61 Atl. 459, *affirming* 66 N. J. Eq. 11, 57 Atl. 730; *Gillette v. Murphy*, 7 Okla. 91, 54 Pac. 413. Compare *ante*, this section, note 13.

<sup>1</sup> *Georgia*.—*Nesbit v. Cautrell*, 29 Ga. 255.

*Illinois*.—*Story v. Hull*, 143 Ill. 506, 32 N. E. 265, *affirming* 41 Ill. App. 109; *Cameron v. Boeger*, 200 Ill. 84, 65 N. E. 690, 93 Am. St. Rep. 165, *affirming* 102 Ill. App. 649.

*New Jersey*.—*Weller v. Jersey City, etc.*, R. Co., 68 N. J. Eq. 659, 6 Ann. Cas. 442, 61 Atl. 459, *affirming* 66 N. J. Eq. 11, 57 Atl. 730.

*Texas*.—*Mays v. Sanders*, 90 Tex. 132, 37 S. W. 595; *American Cotton Co. v. Simmons*, 39 Tex. Civ. App. 189, 87 S. W. 842.

<sup>2</sup> *Weller v. Jersey City, etc.*, R.



although it has been held, under statutes providing for the survival of the right of action, that a cause of action for personal injuries may be assigned.<sup>3</sup> Nor does such a contract entitle, or necessitate, the attorney being made a party to the cause,<sup>4</sup> or give the attorney the right to intervene in the suit.<sup>5</sup> Thus it has been held that a contract with an attorney whereby the latter was to sue for the recovery of lands, and be compensated by a conveyance of a part thereof when recovered, vests no title, legal or equitable, to such property in the attorney.<sup>6</sup> On the other hand, it has also been held that where a client contracts with his attorney to convey to him a portion of the property in litigation, in consideration of legal services to be rendered, the transaction gives the attorney an interest in the property,<sup>7</sup> which may be enforced by specific performance.<sup>8</sup>

§ 427. **Excessive Fees.** — A contract between attorney and client for fees, whether contingent or otherwise, is always subject to scrutiny by the court,<sup>9</sup> as, indeed, are all their other dealings.<sup>10</sup> But the contract will prevail unless it appears that it was induced by fraud, or that, in view of the nature of the claim, the compensation provided for is so excessive as to evince a purpose on the part of the attorney to obtain an improper or undue advantage over his client,<sup>11</sup> it being considered that an attorney may

Co., 68 N. J. Eq. 659, 6 Ann. Cas. 442, 61 Atl. 459; *Pulver v. Harris*, 62 Barb. (N. Y.) 500; *Kusterer v. Beaver Dam*, 56 Wis. 471, 14 N. W. 617, 43 Am. Rep. 725.

<sup>3</sup> *Gulf, etc., R. Co. v. Miller*, 21 Tex. Civ. App. 609, 53 S. W. 709; *Texas Cent. R. Co. v. Andrews*, 28 Tex. Civ. App. 477, 67 S. W. 923.

<sup>4</sup> *Cameron v. Boeger*, 200 Ill. 84, 65 N. E. 690, 93 Am. St. Rep. 165, *affirming* 102 Ill. App. 649; *San Antonio, etc., R. Co. v. Belt*, 24 Tex. Civ. App. 281, 59 S. W. 607.

<sup>5</sup> *Story v. Hull*, 143 Ill. 506, 32 N. E. 265, *affirming* 41 Ill. App. 109.

<sup>6</sup> *Corbin v. Mulligan*, 1 Bush (Ky.) 297.

After litigation in regard to land Attys. at L. Vol. II.—47.

has been amicably adjusted, an attorney of one of the parties cannot affect the settlement by making claim to part of the land under a deed, till then undisclosed, made by his client while suing to recover possession, and constituting, in effect, a contract for contingent compensation. *Murray's Estate*, 13 Pa. Co. Ct. 70.

<sup>7</sup> *Hoffman v. Vallejo*, 45 Cal. 564; *Howard v. Throckmorton*, 48 Cal. 482.

<sup>8</sup> See the preceding section note 13. See also *supra*, § 422, note 18.

<sup>9</sup> See *infra*, § 421.

<sup>10</sup> See *supra*, §§ 152-182.

<sup>11</sup> *Morehouse v. Brooklyn Heights R. Co.*, 185 N. Y. 520, 7 Ann. Cas. 377, 78 N. E. 179; *Weeks v. Gattell*, 125 App. Div. 402, 109 N. Y. S. 977,

properly demand a larger compensation where his fees are contingent on success.<sup>12</sup>

Where the contract provides for the payment of a certain percentage of the recovery, such percentage is to be calculated on the actual amount received,<sup>13</sup> even though it includes interest which accrued since the recovery was had,<sup>14</sup> or even though the thing recovered has enhanced in value.<sup>15</sup> Where, however, the client does not recover the whole amount of a judgment rendered in his favor, the attorney's percentage must be based on the actual recovery; thus it has been held that a contract by a client to pay his attorney, as a contingent fee, a percentage of the damages he may recover in the action, binds him to pay only such percentage of the damages actually received, and not of the judgment rendered.<sup>16</sup>

*affirmed* 193 N. Y. 681, 87 N. E. 1129; *Dorr v. Camden*, 55 W. Va. 226, 46 S. E. 1014, 65 L.R.A. 348. And see *Humphreys v. McLachlan*, 87 Miss. 532, 40 So. 151.

<sup>12</sup> *Morehouse v. Brooklyn Heights R. Co.*, 123 App. Div. 680, 108 N. Y. S. 152, *affirmed* 195 N. Y. 537, 88 N. E. 1126; *Ransom v. Ransom*, 147 App. Div. 835, 133 N. Y. S. 173, *reversing* 70 Misc. 30, 127 N. Y. S. 1027.

<sup>13</sup> *Lavenson v. Wise*, 131 Cal. 369, 63 Pac. 622; *Mellvaine v. Steinson*, 90 App. Div. 77, 85 N. Y. S. 889; *Weeks v. Gattell*, 125 App. Div. 402, 109 N. Y. S. 977, *affirmed* 193 N. Y. 681, 87 N. E. 1129.

Where a contract between attorneys and client provides for the payment, as a contingent fee for services, of a sum equal to "from ten to fifteen per cent" of the market value of the interest of the client recovered, the contract gives them the right to claim fifteen per cent, and they cannot be restricted to ten per cent. *Heiberger v. Worthington*, 23 App. Cas. (D. C.) 565.

But a contract to pay attorneys "five per cent of all that they might save or make" for an estate "by excepting to the settlements of the estate as made by the master" does not entitle them to a percentage on uncontested claims. *Mellvoy v. Russell*, 9 Ky. L. Rep. 359 (abstract).

<sup>14</sup> *Bassford v. Johnson*, 172 N. Y. 488, 65 N. E. 260, *modifying* 71 App. Div. 617, 76 N. Y. S. 1009.

<sup>15</sup> *Chester v. Jumel*, 125 N. Y. 237, 26 N. E. 297, *reversing* 53 Hun 629, 5 N. Y. S. 809.

<sup>16</sup> *California*.—*Adams v. Hopkins*, 69 Pac. 228, *affirmed* 73 Pac. 971.

*Iowa*.—*Rickel v. Chicago, etc., R. Co.*, 112 Ia. 148, 83 N. W. 957.

*Kentucky*.—*Leslie v. York*, 112 Ky. 712, 66 S. W. 751, 23 Ky. L. Rep. 2076.

*New York*.—*Wendel v. Binninger*, 132 App. Div. 785, 117 N. Y. S. 616.

*Virginia*.—*Nickels v. Kane*, 82 Va. 309.

*West Virginia*.—*Fisher v. Mylius*, 42 W. Va. 638, 26 S. E. 309.

Where an attorney was retained in eminent domain proceedings, and

Whether or not the contract is unconscionable is a question of fact, depending upon the character of the claim and the services required in prosecuting it to judgment.<sup>17</sup> Thus contracts for contingent fees have been sustained to the extent of twenty-five per cent,<sup>18</sup> thirty-three and one-third per cent,<sup>19</sup> forty per cent,<sup>20</sup> forty-seven and one-half per cent,<sup>21</sup> and fifty per cent of the recovery;<sup>1</sup> and in some cases a fee of more than fifty per cent has been

to receive for his services ten per cent of whatever was awarded and confirmed, and the court confirmed an award, but directed that inembrances on the property and back taxes should be paid out of it, the attorney was only entitled to 10 per cent of the surplus, and not of the gross amount awarded. *Wendel v. Binninger*, 132 App. Div. 785, 117 N. Y. S. 616.

<sup>17</sup> *Morehouse v. Brooklyn Heights R. Co.*, 185 N. Y. 520, 7 Ann. Cas. 377, 78 N. E. 179.

<sup>18</sup> *Larned v. Dubuque*, 86 Ia. 166, 63 N. W. 105; *Bennett v. Donovan*, 83 App. Div. 95, 82 N. Y. S. 506.

<sup>19</sup> *Rust v. Larue*, 4 Litt. (Ky.) 411, 14 Am. Dec. 172; *Hall v. Gird*, 7 Hill (N. Y.) 586; *In re Hynes*, 105 N. Y. 560, 12 N. E. 60; *Ransom v. Cutting*, 112 App. Div. 150, 98 N. Y. S. 282, *affirmed* 188 N. Y. 447, 81 N. E. 324; *Galveston, etc., R. Co. v. Ginther*, 96 Tex. 295, 72 S. W. 166, *affirming* 30 Tex. Civ. App. 161, 70 S. W. 96.

<sup>20</sup> *Funk v. Mohr*, 185 Ill. 395, 57 N. E. 2, *affirming* 85 Ill. App. 97; *Syme v. Terry & Tench Co.*, 125 App. Div. 610, 110 N. Y. S. 25; *Texas Cent. R. Co. v. Andrews*, 28 Tex. Civ. App. 477, 67 S. W. 923.

<sup>21</sup> *Chester v. Jumel*, 53 Hun 629, 5 N. Y. S. 809; *Chester v. Jumel*, 125 N. Y. 237, 26 N. E. 297, *reversing* 53 Hun 629, 5 N. Y. S. 809.

<sup>1</sup> *Connecticut*.—*Grievance Committee v. Ennis*, 84 Conn. 594, 80 Atl. 767.

*Kentucky*.—*Sanders v. Woodbury*, 146 Ky. 153, 142 S. W. 207.

*Maryland*.—*Cain v. Warford*, 33 Md. 23; *Etzel v. Duncan*, 112 Md. 346, 76 Atl. 493.

*Michigan*.—*Dreiband v. Candler*, 166 Mich. 49, 131 N. W. 129.

*Missouri*.—*Lipscomb v. Adams*, 193 Mo. 530, 91 S. W. 1046, 112 Am. St. Rep. 500.

*New Jersey*.—*Adams v. Schmitt*, 68 N. J. Eq. 168, 60 Atl. 345.

*New York*.—*Deering v. Schreyer*, 171 N. Y. 451, 64 N. E. 179, *reversing* 58 App. Div. 322, 68 N. Y. S. 1615; *In re Fitzsimons*, 174 N. Y. 15, 66 N. E. 554, *reversing* 77 App. Div. 345, 79 N. Y. S. 194; *Morehouse v. Brooklyn Heights R. Co.*, 185 N. Y. 520, 7 Ann. Cas. 377, 78 N. E. 179, *reversing* 102 App. Div. 627, 92 N. Y. S. 1134; *Ransom v. Cutting*, 188 N. Y. 447, 81 N. E. 324, *affirming* 112 App. Div. 150, 98 N. Y. S. 282; *Rogers v. Polytechnic, etc., Inst.*, 87 App. Div. 81, 84 N. Y. S. 12; *Weeks v. Gattell*, 125 App. Div. 402, 109 N. Y. S. 977, *affirmed* 193 N. Y. 681 mem., 87 N. E. 1129; *In re Edgecombe Road*, 128 App. Div. 432, 112 N. Y. S. 845; *McCoy v. Gas Engine & Power Co.*, 71 Misc. 537, 129 N. Y. S. 251; *Stoutenburgh v. Fleer*, 87 N. Y. S. 504.

sanctioned.<sup>2</sup> And, on the other hand, in a recent case, fifty per cent was deemed excessive.<sup>3</sup> The amount of compensation generally will be considered hereafter.<sup>4</sup>

*Matters Affecting Validity of Contracts Generally.*

§ 428. **Fairness.**—As in all other dealings between attorney and client,<sup>5</sup> it is essential that a contract for the compensation of the attorney rest on the utmost good faith; it must be fair,<sup>6</sup>

*Pennsylvania.*—Mumma's Appeal, 127 Pa. St. 474, 18 Atl. 6, 24 W. N. C. 297; Sloan's Estate, 14 Pa. Co. Ct. 359.

*Texas.*—Hart v. Hunter, 52 Tex. Civ. App. 75, 114 S. W. 882; Tabet v. Powell, 78 S. W. 997.

<sup>2</sup> A contract for an attorney's fee for \$7000, contingent on success, in a suit to recover land worth from \$10,000 to \$12,000, the client being otherwise without means, and the parties dealing at arm's length, is not unconscionable, especially where the case was twice carried to the supreme court, and extended over some seven years. *Fellows v. Smith*, 190 Pa. St. 301, 42 Atl. 678.

<sup>3</sup> *Herman v. Metropolitan St. R. Co.*, 121 Fed. 184.

<sup>4</sup> See *infra*, § 439 et seq.

<sup>5</sup> See *supra*, §§ 152-163.

The rule applying to dealings between attorney and client does not apply in the making of a contract to recover an estate by one whose business it is to find estates having no notorious claimant, to hunt up the heirs, and recover the estates for them. *Adams v. Schmitt*, 68 N. J. Eq. 168, 60 Atl. 345.

<sup>6</sup> *United States.*—Manning v. Clark, 10 Fed. 121; Muller v. Kelly, 125 Fed. 212, 60 C. C. A. 170, *reversing* 116 Fed. 545.

*Alabama.*—Lecatt v. Sallee, 3 Port. 115, 29 Am. Dec. 249.

*District of Columbia.*—Whiting v. Davidge, 23 App. Cas. 156.

*Georgia.*—Bailey v. Devine, 123 Ga. 653, 51 S. E. 603, 107 Am. St. Rep. 153.

*Illinois.*—Elmore v. Johnson, 143 Ill. 513, 32 N. E. 413, 36 Am. St. Rep. 401, 21 L.R.A. 366; Robinson v. Sharp, 201 Ill. 86, 66 N. E. 299; Dyrenforth v. Palmer, etc., Co., 240 Ill. 25, 88 N. E. 290; Pratt v. Kerns, 123 Ill. App. 86; Calkins v. Pease, 125 Ill. App. 270.

*Indiana.*—French v. Cunningham, 149 Ind. 632, 49 N. E. 797; Shirk v. Neible, 156 Ind. 66, 59 N. E. 281, 83 Am. St. Rep. 150.

*Iowa.*—Ryan v. Ashton, 42 Ia. 365.

*Kentucky.*—Bibb v. Smith, 1 Dana 580.

*Maine.*—Burnham v. Heselton, 82 Me. 495, 20 Atl. 80, 9 L.R.A. 90.

*Maryland.*—Etzel v. Duncan, 112 Md. 346, 76 Atl. 493.

*New Jersey.*—Adams v. Schmitt, 68 N. J. Eq. 168, 60 Atl. 345.

*New York.*—Blaikie v. Post, 137 App. Div. 648, 122 N. Y. S. 292.

*Oregon.*—Hamilton v. Holmes, 48 Ore. 453, 87 Pac. 154.

*Tennessee.*—Phillips v. Overton, 4 Hayw. 292; Rose v. Mynatt, 7 Verg. 36; McMahan v. Smith, 6 Heisk. 167;

reasonable,<sup>7</sup> and fully comprehended by the client,<sup>8</sup> to whom the attorney must have disclosed any information which he may have, and given proper legal advice.<sup>9</sup> Contracts which comply with these requirements will be upheld;<sup>10</sup> but where these elements are wanting the contract will not be binding on the client,<sup>11</sup>

*Planters' Bank v. Hornberger*, 4 Coldw. 567; *Newman v. Davenport*, 9 Baxt. 538.

*Texas*.—*Waterbury v. Laredo*, 68 Tex. 565, 5 S. W. 81.

*Vermont*.—*Davis v. Farwell*, 80 Vt. 166, 67 Atl. 129.

*Virginia*.—*Thomas v. Turner*, 87 Va. 1, 12 S. E. 149, 668.

<sup>7</sup> See *infra*, § 431.

<sup>8</sup> See *infra*, § 430.

<sup>9</sup> See *infra*, § 430.

<sup>10</sup> *United States*.—*Jenkins v. Einstein*, 3 Biss. 128, 13 Fed. Cas. No. 7,265.

*Alabama*.—*Ware v. Russell*, 70 Ala. 174, 45 Am. Rep. 82.

*Connecticut*.—*Smyth v. Ripley*, 33 Conn. 306.

*Florida*.—*Wharton v. Hammond*, 20 Fla. 934.

*Illinois*.—*Dyrenforth v. Palmer Pneumatic Tire Co.*, 240 Ill. 25, 88 N. E. 290, *following Morrison v. Smith*, 130 Ill. 304, 23 N. E. 241; *Ward v. Yancey*, 78 Ill. App. 368.

*Indiana*.—*Tong v. Orr*, 44 Ind. App. 681, 87 N. E. 147, *affirmed* 44 Ind. App. 693, 88 N. E. 308.

*Iowa*.—*Lindt v. Linder*, 117 Ia. 110, 90 N. W. 596.

*Maryland*.—*Etzel v. Dunean*, 112 Md. 346, 76 Atl. 493.

*Missouri*.—*Wright v. Kansas City, etc., Co.*, 141 Mo. 518, 126 S. W. 517; *Reed v. Mellor*, 5 Mo. App. 567; *Beagles v. Robertson*, 135 Mo. App. 306, 115 S. W. 1042.

*New Jersey*.—*Schomp v. Schenek*,

40 N. J. L. 195, 29 Am. Rep. 219; *Zabriskie v. Woodruff*, 48 N. J. L. 610, 7 Atl. 336.

*New York*.—*Zogbaum v. Parker*, 55 N. Y. 120; *Hall v. Crouse*, 13 Hun 557; *McCoy v. Gas Engine, etc., Co.*, 135 App. Div. 771, 119 N. Y. S. 864; *Porter v. Parmly*, 39 Super. Ct. 219; *Newberg v. Schwab*, 49 Super. Ct. 232; *Allison v. Scheeper*, 9 Daly 365; *Jenkins v. Williams*, 2 How. Pr. 261.

*Oregon*.—*Hamilton v. Holmes*, 48 Ore. 453, 87 Pac. 154.

*Pennsylvania*.—*Mumma's Appeal*, 127 Pa. St. 474, 18 Atl. 6, 24 W. N. C. 297.

*Texas*.—*Tabet v. Powell*, 78 S. W. 997.

*Wisconsin*.—*Ryan v. Martin*, 18 Wis. 672.

<sup>11</sup> *United States*.—*Taylor v. Bemiss*, 110 U. S. 42, 3 S. Ct. 441, 28 U. S. (L. ed.) 64.

*Illinois*.—*Willin v. Burdette*, 172 Ill. 117, 49 N. E. 1000; *Robinson v. Sharp*, 201 Ill. 86, 66 N. E. 299.

*Indiana*.—*Judah v. Vincennes University*, 23 Ind. 273.

*Iowa*.—*Donaldson v. Eaton*, 136 Ia. 650, 114 N. W. 19, 125 Am. St. Rep. 275.

*Kentucky*.—*Downing v. Major*, 2 Dana 228; *Smith v. Thompson*, 7 B. Mon. 308; *Howard v. Cornelison*, 5 Ky. L. Rep. 902.

*Maryland*.—*Etzel v. Dunean*, 112 Md. 346, 76 Atl. 493.

*New York*.—*Wallis v. Loubat*, 2 Den. 607.

and the attorney can only recover, if at all, on a *quantum meruit*.<sup>12</sup>

Because of their confidential relations,<sup>13</sup> the law commands that all the transactions between an attorney and his client, including contracts for compensation, shall be anxiously and jealously scrutinized, that the client may be protected from his own overweening confidence, and from the influence or ascendancy which the relation generates.<sup>14</sup> Nor does a statute permitting attorneys to con-

*Oregon*.—*Ah Foe v. Bennett*, 35 Ore. 231, 58 Pac. 508.

*Tennessee*.—*Planters Bank v. Hornberger*, 4 Coldw. 531.

*Washington*.—*Schultheis v. Nash*, 27 Wash. 250, 67 Pac. 707.

<sup>12</sup> *Illinois*.—*Elmore v. Johnson*, 143 Ill. 513, 32 N. E. 413, 36 Am. St. Rep. 401, 21 L.R.A. 366; *Pratt v. Kerns*, 123 Ill. App. 86.

*Indiana*.—*French v. Cunningham*, 149 Ind. 632, 49 N. E. 797; *Shirk v. Neible*, 156 Ind. 66, 59 N. E. 281, 83 Am. St. Rep. 150.

*Pennsylvania*.—*Chester County v. Barber*, 97 Pa. St. 455.

*Tennessee*.—*Planters Bank v. Hornberger*, 4 Coldw. 531.

*Texas*.—*Stewart v. Houston, etc., R. Co.*, 62 Tex. 248.

*West Virginia*.—*Dorr v. Camden*, 55 W. Va. 226, 46 S. E. 1014, 65 L.R.A. 348.

<sup>13</sup> *Elmore v. Johnson*, 143 Ill. 513, 32 N. E. 413, 36 Am. St. Rep. 401, 21 L.R.A. 366.

In view of the fiduciary relation between an attorney and client, a court of equity may inquire into the good faith of a written agreement between them for compensation, notwithstanding Code Civ. Proc. § 66 (Judiciary Law [Consol. Laws 1909, c. 30] § 474), providing that the compensation of an attorney for services is governed by an

agreement, express or implied, which is not restrained by law, though a written agreement should not be set aside unless there has been a misrepresentation or suppression of facts by the attorney or undue influence by which he has obtained an unconscionable advantage. *Ransom v. Ransom*, 147 App. Div. 835, 133 N. Y. S. 173, *reversing* 70 Misc. 30, 127 N. Y. S. 1027.

<sup>14</sup> *United States*.—*Muller v. Kelly*, 125 Fed. 212, 60 C. C. A. 170, *reversing* 116 Fed. 545.

*Alabama*.—*Dickinson v. Bradford*, 59 Ala. 581, 31 Am. Rep. 23; *Kidd v. Williams*, 132 Ala. 140, 31 So. 458, 56 L.R.A. 879.

*Illinois*.—*Dyrenforth v. Palmer, etc., Co.*, 240 Ill. 25, 88 N. E. 290.

*Iowa*.—*Donaldson v. Eaton*, 136 Iowa 650, 114 N. W. 19, 125 A. S. R. 275, 14 L.R.A. (N.S.) 1168.

*Maryland*.—*Etzel v. Duncan*, 112 Md. 346, 76 Atl. 493.

*New Jersey*.—*Schomp v. Schenk*, 40 N. J. L. 195, 29 Am. Rep. 219.

*New York*.—*Brotherson v. Consalus*, 26 How. Pr. 213; *Burling v. King*, 2 Thomp. & C. 545; *Fowler v. Callan*, 102 N. Y. 395, 7 N. E. 169; *Blaikie v. Post*, 137 App. Div. 648, 122 N. Y. S. 292.

*Oregon*.—*Hamilton v. Holmes*, 48 Ore. 153, 87 Pac. 154.

tract with their clients relieve such dealings from that supervision which the courts have ever exercised.<sup>15</sup>

**§ 429. Advice and Disclosure of Fact by Attorney.**—Attorneys, in entering into contracts of employment with clients, are required to exercise the highest order of good faith, not only in advising the client, but also in disclosing all information in their possession as to facts which would or might influence him either in entering into, or refusing to execute, the contract. The failure to do so renders the contract presumptively void.<sup>16</sup> Thus an attorney cannot recover on an agreement by his client to pay him for services, when the agreement was brought about by his fraudulent misrepresentations as to the amount which would be recovered in a suit,<sup>17</sup> or as to the magnitude of the services to be

*Pennsylvania.*—*Chester County v. Barber*, 97 Pa. St. 455.

*Washington.*—*Isham v. Parker*, 3 Wash. 755, 29 Pac. 835.

*Wisconsin.*—*Allard v. Lamirande*, 29 Wis. 502; *Dockery v. McLellan*, 93 Wis. 381, 67 N. W. 733.

<sup>15</sup> *Morton v. Forsee*, 249 Mo. 409, 155 S. W. 765; *Haight v. Moore*, 37 Super. Ct. (N. Y.) 161.

<sup>16</sup> *Alabama.*—*Kidd v. Williams*, 132 Ala. 140, 31 So. 458, 56 L.R.A. 879.

*Arkansas.*—*Weil v. Fineran*, 78 Ark. 87, 93 S. W. 568.

*Illinois.*—*Pratt v. Kerns*, 123 Ill. App. 86.

*Indiana.*—*Manley v. Felty*, 146 Ind. 194, 45 N. E. 74.

*Iowa.*—*Ryan v. Ashton*, 42 Ia. 365; *Donaldson v. Eaton*, 136 Ia. 650, 114 N. W. 19, 125 Am. St. Rep. 275.

*New York.*—*White v. Whaley*, 40 How. Pr. 353; *Blaikie v. Post*, 137 App. Div. 648, 122 N. Y. S. 292; *Ransom v. Ransom*, 147 App. Div. 835, 133 N. Y. S. 173, *reversing* 70 Misc. 30, 127 N. Y. S. 1027.

*Pennsylvania.*—*Chester County v. Barber*, 97 Pa. St. 455.

*Texas.*—*Stewart v. Houston, etc.*, R. Co., 62 Tex. 248.

*West Virginia.*—*Dorr v. Camden*, 55 W. Va. 226, 46 S. E. 1014, 65 L.R.A. 348.

*Mutual Mistake.*—Where an attorney and client, under the belief that a homestead entry contained valuable timber land, agreed that for a certain fee the former should contest the entry, and the agreement gave the client the right to rescind if upon a cruise the land did not show 10,000,000 feet, the agreement was unenforceable against the client, there being no timber on the land, even though the client did not have it cruised, for the timber was the subject-matter of the contract, and the parties having by mutual mistake contracted with respect to a nonexisting subject-matter, the agreement was without consideration. *Kelsey v. Mackay*, 65 Wash. 116, 117 Pac. 714.

<sup>17</sup> *Judah v. Vincennes University*, 23 Ind. 273.

performed.<sup>18</sup> The burden is on the attorney to show that the client was sufficiently advised and informed.<sup>19</sup>

**§ 430. Contract Must Be Understood by Client.**—It is the duty of an attorney to have his contracts with his client clearly and definitely stated,<sup>20</sup> so that the client may fully comprehend them, not only in language, but also in spirit, legal consequences, and practical results;<sup>1</sup> and this is especially true where from the client's age, infirmities, or ignorance, the necessity of such distinctness is self-evident.<sup>2</sup> Where the contract is fairly and reasonably susceptible of two constructions, and the one mind assents to it upon the one construction, and the other upon the other construction, there is no contract between the parties; and where such a writing exists between attorney and client, it is the duty of the attorney to inform the client of the fact of its susceptibility of two constructions, and to learn, definitely and clearly, his client's views before proceeding further.<sup>3</sup> Thus where the terms of a contract for services between client and attorney were ambiguous and indefinite in their consequences to the client, sus-

<sup>18</sup> *White v. Whaley*, 40 How. Pr. (N. Y.) 353; *Johnson v. Mann*, 72 Wash. 651, 131 Pac. 213.

<sup>19</sup> *In re Mayer*, 84 Hun 539, 32 N. Y. S. 850; *Blaikie v. Post*, 137 App. Div. 648, 122 N. Y. S. 292; *Haight v. Moore*, 37 Super. Ct. (N. Y.) 161.

<sup>20</sup> See *supra*, § 419. See also *Reynolds v. Sorosis Fruit Co.*, 133 Cal. 625, 66 Pac. 21.

<sup>1</sup> *California*.—*Reynolds v. Sorosis Fruit Co.*, 133 Cal. 625, 66 Pac. 21.

*Illinois*.—*People's Casualty, etc., Co. v. Darrow*, 70 Ill. App. 22, *affirmed* 172 Ill. 62, 49 N. E. 1005.

*New York*.—*Brock v. Barnes*, 40 Barb. 521; *Blaikie v. Post*, 137 App. Div. 648, 122 N. Y. S. 292.

*Tennessee*.—*Planters' Bank v. Hornberger*, 4 Coldw. 531.

*Long Acquiescence*.—Where a contract as to fees between attorney and

client had been acted upon by the parties for nearly twenty years, the court refused to disturb it. *Smith v. Thompson*, 7 B. Mon. (Ky.) 305.

A failure by a client to object to his attorney's bill for services until nine months after rendered is not unreasonable, where other attorneys employed by the client had been trying to see the attorney and secure a satisfactory explanation, and where the attorney could not have changed his position to his injury. *Tate v. Field*, 60 N. J. Eq. 42, 46 Atl. 952.

<sup>2</sup> *Brock v. Barnes*, 40 Barb. (N. Y.) 521.

<sup>3</sup> *Reynolds v. Sorosis Fruit Co.*, 133 Cal. 625, 66 Pac. 21; *People's Casualty, etc., Co. v. Darrow*, 70 Ill. App. 22, *affirmed* 172 Ill. 62, 49 N. E. 1005; *Planters' Bank v. Hornberger*, 4 Coldw. (Tenn.) 531.



ceptible of unconscionable advantage on the part of the attorney, and, if enforced, of injury to the client, it was held that the contract would be set aside, and the attorney be allowed only the reasonable value of his services.<sup>4</sup>

**§ 431. Unconscionable Contracts.**—Where a contract of employment between attorney and client is procured by unfair means, and the compensation therein fixed is so unreasonably excessive as to amount to an extortion, or to evince a purpose on the part of the attorney to obtain an undue advantage of the client, the contract will be deemed to be an unconscionable one,<sup>5</sup> and may be set aside on the client's application;<sup>6</sup> the attorney being allowed only the reasonable value of the services rendered by him in good

<sup>4</sup> *Planters' Bank v. Hornberger*, 4 Coldw. (Tenn.) 531.

<sup>5</sup> *United States*.—*Taylor v. Bemiss*, 110 U. S. 42, 3 S. Ct. 441, 28 U. S. (L. ed.) 64; *Herman v. Metropolitan St. R. Co.*, 121 Fed. 184; *Muller v. Kelly*, 125 Fed. 213, 60 C. C. A. 170.

*Connecticut*.—*Grievance Committee v. Ennis*, 84 Conn. 594, 80 Atl. 767.

*Illinois*.—*Pratt v. Kerns*, 123 Ill. App. 86.

*Iowa*.—*Donaldson v. Eaton*, 136 Ia. 650, 114 N. W. 19, 125 Am. St. Rep. 275, 14 L.R.A.(N.S.) 1168.

*Kentucky*.—*Henry v. Vance*, 111 Ky. 72, 63 S. W. 273, 23 Ky. L. Rep. 491.

*Maryland*.—*Etzel v. Duncan*, 112 Md. 346, 76 Atl. 493.

*Missouri*.—*Ball v. Reyburn*, 136 Mo. App. 546, 118 S. W. 524.

*New York*.—*Hitchings v. Van Brunt*, 5 Abb. Pr. N. S. 272; *Morehouse v. Brooklyn Heights R. Co.*, 185 N. Y. 520, 7 Ann. Cas. 377, 78 N. E. 179, reversing 102 App. Div. 627, 92 N. Y. S. 1134; *In re Pieris*, 82 App.

Div. 466, 81 N. Y. S. 927, affirmed 176 N. Y. 566, 68 N. E. 1123; *Burke v. Baker*, 111 App. Div. 422, 97 N. Y. S. 768, affirmed 188 N. Y. 561, 80 N. E. 1033; *In re Bensel*, 68 Misc. 70, 124 N. Y. S. 726; *Ransom v. Ransom*, 70 Misc. 30, 127 N. Y. S. 1027; *Eysaman v. Nelson*, 79 Misc. 304, 140 N. Y. S. 183.

*Tennessee*.—*Cooper v. Bell*, 153 S. W. 844.

*Washington*.—*Schultheis v. Nash*, 27 Wash. 250, 67 Pac. 707.

"The word 'unconscionable' has frequently been applied to contracts made by lawyers for what were deemed exorbitant contingent fees. But by that nothing more has been meant than that the amount of the fee, standing alone and unexplained, may be sufficient to show that an unfair advantage was taken of the client or, in other words, that a legal fraud was perpetrated upon him." *McCoy v. Gas Engine, etc., Co.*, 135 App. Div. 771, 119 N. Y. S. 864.

<sup>6</sup> *Polson v. Young*, 37 Ia. 196; *Mason v. Ring*, 2 Abb. Pr. N. S. (N. Y.) 322.

faith.<sup>7</sup> In such cases the burden is on the attorney to show that the contract was free from fraud, undue influence, or exorbitant demand.<sup>8</sup> The court will not, of course, interfere with lawful contracts for compensation in which the charge made is not out of proportion with the services rendered.<sup>9</sup> A client who discharges his attorney and substitutes another, and thereafter, finding that the services of the first attorney were necessary by reason of his special fitness, re-employs him under a written contract for a contingent fee, cannot thereafter complain that the attorney drove a hard bargain.<sup>10</sup>

### § 432. Time of Making Contract as Affecting its Validity.

—It is universally conceded that the principles stated in the preceding sections under this subdivision<sup>11</sup> apply with full force and vigor to all such contracts for compensation as are entered into between attorney and client after the establishment, and

<sup>7</sup> *Jenkins v. Dodge*, 11 B. Mon. (Ky.) 178; *Colgan v. Jones*, 44 N. J. Eq. 274, 18 Atl. 55; *Turnbull v. Banks*, 22 App. Div. 508, 48 N. Y. S. 40.

Where a deed by a client executed as compensation for his attorney's services is set aside because of undue influence, it should be allowed to stand as security for what is actually due. *Mason v. Ring*, 2 Abb. Pr. N. S. (N. Y.) 322.

<sup>8</sup> *Wagner v. Phillips*, 78 N. J. Eq. 33, 78 Atl. 806; *Newman v. Davenport*, 9 Baxt. (Tenn.) 538; *McMahon v. Smith*, 6 Heisk. (Tenn.) 167; *Cullop v. Leonard*, 97 Va. 256, 33 S. E. 611.

*Question of Fact.*—Whether a contract is unconscionable is a question of fact, depending on the character of the claim and the amount of services necessarily rendered in its prosecution. *Morehouse v. Brooklyn Heights R. Co.*, 185 N. Y. 520, 7 Ann. Cas. 377, 78 N. E. 179, *reversing* 102 App. Div. 627, 92 N. Y. S. 1134.

<sup>9</sup> *Ball v. Reyburn*, 136 Mo. App. 546, 118 S. W. 524.

Where a contract is free from fraud, and not so excessive as to evince a purpose on the part of the attorney to obtain an undue advantage of his client, it cannot be said, as a matter of law, to be unconscionable merely because the amount of compensation provided for appears to be unusually large. *Weeks v. Gattell*, 125 App. Div. 402, 109 N. Y. S. 977, *affirmed* 193 N. Y. 681, 87 N. E. 1129; *In re Fitzsimons*, 174 N. Y. 15, 66 N. E. 554; *Morehouse v. Brooklyn Heights R. Co.*, 185 N. Y. 520, 7 Ann. Cas. 377, 78 N. E. 179, *reversing* 102 App. Div. 627, 92 N. Y. S. 1134; *Ransom v. Cutting*, 188 N. Y. 447, 81 N. E. 324.

<sup>10</sup> *Burke v. Baker*, 111 App. Div. 422, 97 N. Y. S. 768, *affirmed* 188 N. Y. 561, 80 N. E. 1033.

<sup>11</sup> §§ 428-431.

during the continuance, of the professional relation;<sup>12</sup> and that, as to these, it will require the most convincing proof of good faith on the part of the attorney, and of full knowledge of the terms of the contract, and entire freedom of action, on the part of his client, before a court will sanction the agreement.<sup>13</sup> So where an attorney, during the continuance of the fiduciary relation, procures from his client a contract for greater compensation than that originally agreed upon, the transaction will be deemed presumptively void.<sup>14</sup> In either case, if the amount fixed is

<sup>12</sup> *Alabama*.—Leeatt *v.* Sallee, 3 Port. 115, 29 Am. Dec. 249; Dickinson *v.* Bradford, 59 Ala. 581, 31 Am. Rep. 23.

*Indiana*.—French *v.* Cunningham, 149 Ind. 632, 49 N. E. 797.

*Iowa*.—Bolton *v.* Daily, 48 Ia. 348.

*Kentucky*.—Bibb *v.* Smith, 1 Dana 580.

*New York*.—Whitehead *v.* Kennedy, 69 N. Y. 462, *affirming*, 7 Hun 230.

*Ohio*.—Carlton *v.* Dustin, 9 Ohio Dec. (Reprint) 51, 10 Cine. L. Bul. 294.

*Tennessee*.—Phillips *v.* Overton, 4 Hayw. 291; Rose *v.* Mynatt, 7 Yerg. 30.

*Virginia*.—Thomas *v.* Turner, 87 Va. 1, 12 S. E. 149, 668.

A *Missouri statute* provides, in effect, that in all suits in equity and actions at law, it shall be lawful for an attorney, either before or after a suit is brought, to contract with his client for a certain percentage of the proceeds of the client's suit or action or the settlement of it, either before the institution of the action or at any stage thereafter. Beagles *v.* Robertson, 135 Mo. App. 306, 115 S. W. 1042.

<sup>13</sup> *Indiana*.—French *v.* Cunningham, 149 Ind. 632, 49 N. E. 797; Shirk *v.* Neible, 156 Ind. 66, 59 N. E. 281, 83 Am. St. Rep. 150.

*Maryland*.—Etzel *v.* Duncan, 112 Md. 346, 76 Atl. 493.

*New Jersey*.—Brown *v.* Bulkley, 14 N. J. Eq. 451.

*New York*.—Evans *v.* Ellis, 5 Den. 640.

<sup>14</sup> *Alabama*.—Leeatt *v.* Sallee, 3 Port. 115, 29 Am. Dec. 249; Dickinson *v.* Bradford, 59 Ala. 581, 31 Am. Rep. 23; White *v.* Tolliver, 110 Ala. 300, 20 So. 97.

*Arkansas*.—Marshall *v.* Dossett, 57 Ark. 93, 20 S. W. 810.

*Illinois*.—Hughes *v.* Zeigler, 69 Ill. 38; Dyer *v.* Sutherland, 75 Ill. 583.

*Kentucky*.—Bibb *v.* Smith, 1 Dana 580.

*Minnesota*.—Farmer *v.* Stillwater Water Co., 108 Minn. 41, 121 N. W. 418.

*Mississippi*.—Nathan *v.* Halsell, 91 Miss. 785, 45 So. 856.

*New York*.—Haight *v.* Moore, 37 Super. Ct. 161; Blaikie *v.* Post, 137 App. Div. 648, 122 N. Y. S. 292.

*Tennessee*.—Planters' Bank *v.* Hornberger, 4 Coldw. 531; Rose *v.* Mynatt, 7 Yerg. 30; McLahan *v.* Smith, 6 Heisk. 167; Newman *v.* Davenport, 9 Baxt. 538.

*Texas*.—Waterbury *v.* Laredo, 68 Tex. 565, 5 S. W. 81; Kahle *v.* Plummer, 74 S. W. 786.

exorbitant and objection has been made by the client, the attorney will be limited to reasonable compensation for the services rendered.<sup>15</sup>

But these rules were not intended to prevent clients from contracting for the attorney's services in connection with business other than that in which he was originally retained;<sup>16</sup> nor do they apply where the contract has been fully performed, and the client, being *sui juris* and informed as to the business transacted, and in all other respects on equal terms, and dealing at arm's

*Vermont*.—Mott *v.* Harrington, 12 Vt. 199.

*Virginia*.—Thomas *v.* Turner, 87 Va. 1, 12 S. E. 149, 668.

*West Virginia*.—Keenan *v.* Scott, 64 W. Va. 137, 61 S. E. 806.

<sup>15</sup> *England*.—Walmesley *v.* Booth, 2 Atk. 27.

*Alabama*.—Dickinson *v.* Bradford, 59 Ala. 581, 31 Am. Rep. 23; Yonge *v.* Hooper, 73 Ala. 119; White *v.* Tolliver, 110 Ala. 300, 20 So. 97; Kidd *v.* Williams, 132 Ala. 140, 31 So. 458, 56 L.R.A. 879.

*Arkansas*.—Marshall *v.* Dossett, 57 Ark. 93, 20 S. W. 810.

*Illinois*.—Elmore *v.* Johnson, 143 Ill. 513, 32 N. E. 413, 36 Am. St. Rep. 415, 21 L.R.A. 366.

*Indiana*.—French *v.* Cunningham, 149 Ind. 632, 49 N. E. 797; Shirk *v.* Neible, 156 Ind. 66, 59 N. E. 281, 83 Am. St. Rep. 150.

*Iowa*.—Polson *v.* Young, 37 Ia. 196; Bolton *v.* Daily, 48 Ia. 348.

*Massachusetts*.—Bar Assoc. of Boston *v.* Hale, 197 Mass. 423, 83 N. E. 885.

*New Jersey*.—Colgan *v.* Jones, 44 N. J. Eq. 274, 18 Atl. 55; Porter *v.* Bergen, 54 N. J. Eq. 405, 34 Atl. 1067.

*New York*.—Blaikie *v.* Post, 137 App. Div. 648, 122 N. Y. S. 292.

*Tennessee*.—Phillips *v.* Overton, 4

Hayw. 291; Rose *v.* Mynatt, 7 Yerg. 30; Newman *v.* Davenport, 9 Baxt. 538; Planters' Bank *v.* Hornberger, 4 Coldw. 531.

*Texas*.—Waterbury *v.* Laredo, 68 Tex. 565, 5 S. W. 81.

*Vermont*.—Mott *v.* Harrington, 12 Vt. 199.

*Virginia*.—Thomas *v.* Turner, 87 Va. 1, 12 S. E. 149, 668.

*West Virginia*.—Keenan *v.* Scott, 64 W. Va. 137, 61 S. E. 806.

<sup>16</sup> Waterbury *v.* Laredo, 68 Tex. 565, 5 S. W. 81.

Thus where the attorney of a corporation is employed at a salary which, as also his term of employment, may be changed at the option of the corporation, there is nothing illegal or improper in his making a contract with the corporation for a special fee in a special case; no undue influence, persuasion, or misrepresentation being used by him. Bartlett *v.* Odd-Fellows' Sav. Bank, 79 Cal. 218, 21 Pac. 743, 12 Am. St. Rep. 139.

Where a contract had been made between an attorney at law and an intestate for a fixed fee, and subsequently, the attorney made a new bargain with the representatives of the estate by which there was substituted for the fixed fee, a contingent fee of ten per cent of the amount recovered,

length with his attorney, voluntarily stipulates with him for compensation for his services.<sup>17</sup>

Some cases maintain that the obligation of the attorney to show that the contract is fair and reasonable does not apply to contracts of retainer whereby the relation is established,<sup>18</sup> especially where the attorney openly assumes a hostile attitude toward the prospective client,<sup>19</sup> because, it is claimed, the fiduciary relation does not exist until the contract has been made, and, therefore, the parties are on an equal footing and acting at arm's length.<sup>20</sup> So, it has been held that the affirmance, during the existence of the professional relation, of the original contract of employment, was not objectionable.<sup>1</sup> But this view seems to overlook, not only the general rules governing dealings between attorney and client,<sup>2</sup> but also the fact that the relation of attorney and client arises concurrently with the execution of the contract of employment, and requires good faith on the part of the attorney in so advising the prospective client that he may act intelligently,<sup>3</sup> and in disclosing to him such facts as may be material for consideration in determining whether or not he should enter into the contract.<sup>4</sup>

*Contracts in Contravention of Public Policy.*

§ 433. **In General.**—A contract of employment between attorney and client which is in violation of public policy or good

it was held that the second agreement was valid. *Goldthwaite v. Whitney*, 50 Fed. 668.

<sup>17</sup> *Kidd v. Williams*, 132 Ala. 140, 31 So. 458, 56 L.R.A. 879; *Ward v. Yancey*, 78 Ill. App. 368; *McElrath v. Dupuy*, 2 La. Ann. 521.

<sup>18</sup> *California*.—*Cooley v. Miller*, 156 Cal. 510, 105 Pac. 981.

*Kentucky*.—*Rust v. Larue*, 4 Litt. 412, 14 Am. Dec. 172.

*Massachusetts*.—*Bar Assoc. v. Hale*, 197 Mass. 423, 83 N. E. 885.

*New York*.—*Clifford v. Braun*, 71 App. Div. 432, 75 N. Y. S. 856; *Title Guarantee & Trust Co. v. Stenberg*, 119 App. Div. 28, 103 N. Y. S. 857.

*Wisconsin*.—*Dockery v. McLellan*, 93 Wis. 381, 67 N. W. 733.

<sup>19</sup> *Cooley v. Miller*, 156 Cal. 510, 105 Pac. 981.

<sup>20</sup> *Cooley v. Miller*, 156 Cal. 510, 105 Pac. 981; *Clifford v. Braun*, 71 App. Div. 432, 75 N. Y. S. 856; *Dockery v. McLellan*, 93 Wis. 381, 67 N. W. 733.

<sup>1</sup> *Elmore v. Johnson*, 143 Ill. 513, 32 N. E. 413, 36 Am. St. Rep. 415, 21 L.R.A. 366; *Zogbaun v. Parker*, 66 Barb. (N. Y.) 341.

<sup>2</sup> See *supra*, §§ 152-163.

<sup>3</sup> *Manley v. Felty*, 146 Ind. 194, 45 N. E. 74. See also *supra*, §§ 155.

<sup>4</sup> See *supra*, § 429. See also *supra*, § 155.

morals is void, and no recovery may be had thereunder.<sup>5</sup> Where the tendency of a contract is necessarily to induce the doing of matters which are opposed to public policy and good morals, that fact may be considered in determining its validity, and if that is its necessary tendency to an appreciable degree, the contract will be void whether it induced the prohibited acts or not.<sup>6</sup> Thus an attorney cannot recover under a contract for the collection of gambling debts,<sup>7</sup> or for giving such advice to a client as would enable, if not induce, him to elude the process of the law, as, for instance, advice given to an officer which is calculated to induce him to violate his duty.<sup>8</sup> Likewise as to an agreement looking to securing the favor of witnesses against the client in a criminal prosecution;<sup>9</sup> and so as to a contract for services to be rendered in influencing a public official to grant government contracts to particular persons.<sup>10</sup> And where the amount of an attorney's fee has been fixed by statute, it has been held that an agreement to take a greater fee than that so fixed is in

<sup>5</sup> *Connecticut*.—*Treat v. Jones*, 28 Conn. 334.

*Illinois*.—*Elmore v. Johnson*, 143 Ill. 513, 32 N. E. 413, 36 Am. St. Rep. 401, 21 L.R.A. 366; *Strong v. International, etc., Union*, 183 Ill. 97, 55 N. E. 675, 47 L.R.A. 792.

*Iowa*.—*Boardman v. Thompson*, 25 Ia. 487; *Adye v. Hanna*, 47 Ia. 264, 29 Am. Rep. 484; *Jewel v. Neidy*, 61 Ia. 300, 16 N. W. 141; *Hyatt v. Burlington C. R. Co.*, 68 Ia. 662, 27 N. W. 815; *Donaldson v. Eaton*, 136 Ia. 650, 114 N. W. 19, 125 Am. St. Rep. 275, 14 L.R.A. (N.S.) 1168.

*Indiana*.—*McCabe v. Britton*, 79 Ind. 224.

*Massachusetts*.—*Thurston v. Percival*, 1 Pick. 415; *Barry v. Capen*, 151 Mass. 99, 23 N. E. 725, 6 L.R.A. 808.

*Minnesota*.—*Gammons v. Johnson*, 69 Minn. 488, 72 N. W. 563; *Gammons v. Gulbranson*, 78 Minn. 21, 80 N. W. 779.

*Michigan*.—*Jordan v. Westerman*,

62 Mich. 170, 28 N. W. 826, 4 Am. St. Rep. 836.

*Missouri*.—*Duke v. Harper*, 66 Mo. 51, 27 Am. Rep. 314; *MacDonald v. Wagner*, 5 Mo. App. 56.

*New York*.—*Delahunty v. Canfield*, 118 App. Div. 883, 103 N. Y. S. 939.

*Tennessee*.—*Newman v. Davenport*, 9 Baxt. 542.

*Virginia*.—*Thomas v. Turner*, 87 Va. 1, 12 S. E. 149, 668.

*West Virginia*.—*Lane v. Black*, 21 W. Va. 617; *Lewis v. Broun*, 36 W. Va. 1, 14 S. E. 444; *Keenan v. Scott*, 64 W. Va. 137, 61 S. E. 803.

<sup>6</sup> *Barry v. Capen*, 151 Mass. 99, 23 N. E. 725, 23 L.R.A. 795.

<sup>7</sup> *Delahunty v. Canfield*, 118 App. Div. 883, 103 N. Y. S. 939.

<sup>8</sup> *Arrington v. Sneed*, 18 Tex. 135.

<sup>9</sup> *Bailey v. Devine*, 123 Ga. 653, 51 S. E. 603, 107 Am. St. Rep. 153.

<sup>10</sup> *Newman v. Davenport*, 9 Baxt. (Tenn.) 542.

contravention of public policy.<sup>11</sup> But the fact that an attorney renders illegal services will not of itself avoid the contract where the consideration of the client's promise required only the performance of legal services.<sup>12</sup> Nor will the fact that the client

<sup>11</sup> Where a statute fixes the maximum allowance for attorney fees for the collection of certain claims at fifteen per cent, and a claimant agreed in writing with an attorney to give him a certain percentage of the amount that should be allowed by the Court of Claims in addition to the fifteen per cent which the court was to allow, such contract is void because in violation of the policy of the act of Congress which impliedly prohibits contracts for a larger amount than specified therein. *Lynch v. Pollard*, 26 Tex. Civ. App. 103, 62 S. W. 945, following *Tanner v. U. S.*, 32 Ct. Cl. 192, and *Ball v. Halsell*, 161 U. S. 72, 16 S. Ct. 554, 40 U. S. (L. ed.) 622. Compare, as authority to the contrary, the case of *Davis v. Com.*, 164 Mass. 241, 41 N. E. 292, 30 L.R.A. 743, wherein it was held that an agent employed by the state of Massachusetts to collect a claim against the United States due as a return of direct taxes, was entitled to recover, notwithstanding that the act of Congress, under which the return was made, provided that no part of the money appropriated for that purpose should be paid to "any attorney or agent under any contract for services" made between the state and such agent or attorney.

An agreement to pay a certain per cent of the claims for damages done by Confederate cruisers, as compensation for collecting them, is not void, as conflicting with act of Congress of June 23, 1874, providing for an allow-

ance of fees of attorney for owners of such claims, and declaring void all other liens or assignments for such services. *Grapel v. Hodges*, 112 N. Y. 419, 20 N. E. 542, affirming 49 Hun 107, 1 N. Y. S. 823.

An agreement made a fortnight before the treaty of Washington of 1871, and by which the owners of a ship and cargo taken by the armed rebel cruiser Florida employed a person, whether an attorney at law or not, to use his best efforts to collect their "claim arising out of the capture," and authorized him to employ such attorneys as he might think fit to prosecute it, and promised to pay him "a compensation equal to twenty-five per cent of whatever sum shall be collected on the said claim," applies to a sum awarded to them by the court of commissioners of Alabama claims, established by the act of June 23, 1874, c. 459; and is not affected by section 18 of that act, providing that that court should allow, out of the amount awarded on any claim, reasonable compensation to the counselor and attorney for the claimant, and issue a warrant therefor, and that all other liens or assignments, either absolute or conditional, for past or future services about any claim, made or to be made before judgment in that court, should be void. *Bachman v. Lawson*, 109 U. S. 659, 3 S. Ct. 479, 27 U. S. (L. ed.) 1067.

<sup>12</sup> *Barry v. Capen*, 151 Mass. 99, 23 N. E. 725, 6 L.R.A. 808.

believed that the attorney would act unlawfully render the contract for compensation void, unless the attorney agreed so to act.<sup>13</sup> A valid contract for compensation will not be abrogated by an attempt to merge it in a void contract.<sup>14</sup> Where the contract is reduced to writing, and is not so ambiguous or technical as to require explanation, it is the duty of the court to determine as a matter of law whether it contravenes public policy or not; but where the terms and conditions of such agreement are in dispute, and must be determined upon conflicting evidence, the question must be submitted to the jury with proper instructions.<sup>15</sup> Contracts for contingent fees are no longer considered unlawful<sup>16</sup> excepting where, in some jurisdictions, the attorney agrees to pay the costs and expenses,<sup>17</sup> or to act gratuitously in the event of failure,<sup>18</sup> or to forbid settlement by the client.<sup>19</sup>

#### § 434. As Dependent on Nature of Services Rendered. —

While it is true that an attorney may contract and recover for professional services rendered in court, or before a government department, or legislative body,<sup>20</sup> he cannot lawfully agree to do

<sup>13</sup> *Mulligan v. Smith*, 32 Colo. 404, 76 Pac. 1063.

<sup>14</sup> *McCurdy v. Dillon*, 135 Mich. 678, 98 N. W. 746, 10 Detroit Leg. N. 927.

<sup>15</sup> *Mulligan v. Smith*, 32 Colo. 404, 76 Pac. 1063.

<sup>16</sup> See *supra*, § 386.

<sup>17</sup> See *supra*, § 389.

<sup>18</sup> See *supra*, § 388.

<sup>19</sup> See *infra*, § 435. And see also, *supra*, § 390.

<sup>20</sup> *McBratney v. Chandler*, 22 Kan. 692, 31 Am. Rep. 213; *Stroemer v. Van Orsdel*, 74 Neb. 132, 103 N. W. 1053, 4 L.R.A.(N.S.) 212, *affirmed on rehearing* 74 Neb. 143, 107 N. W. 125, 4 L.R.A.(N.S.) 218.

*Employment to Secure Pardon.*— "There was nothing unlawful or opposed to public policy in simply employing the plaintiff to endeavor, by proper means, to secure a pardon.

*Chadwick v. Knox*, 31 N. H. 226, 64 Am. Dec. 329; *Formby v. Pryor*, 15 Ga. 258; *Bremser v. Engler*, 49 Super. Ct. (N. Y.) 172. The grounds upon which the constitutional power to pardon may be exercised are not defined in the constitution; but among the considerations which might properly be brought to the attention of the governor, and influence his action, are some which suggest the propriety of employing the professional services of an attorney for this purpose, and from the mere fact of an attorney being employed to solicit the pardon of a convict it is not to be legally inferred that an unlawful course of conduct was intended. For instance, it would be proper and often expedient, that an attorney at law examine the case upon which the conviction was based, to see whether, notwithstanding the final



anything which interferes with the due administration of justice,<sup>1</sup> or the general welfare of the state and of society.<sup>2</sup> Thus a contract whereby an attorney undertakes to procure the settlement of a criminal charge is contrary to the policy of the law and, therefore, unenforceable, especially where the attorney's compensation is dependent on success;<sup>3</sup> nor should an attorney contract for compensation contingent on the conviction of one charged with crime.<sup>4</sup> So, contracts have been declared void, as against public policy, where an attorney agreed to defend anticipated prosecutions for prospective violations of the law,<sup>5</sup> and where he

judgment of the law, the case may not be of such a nature as to justify the exercise of the extraordinary power of pardon. He may direct investigations to the discovery of facts bearing upon the question of guilt, not discoverable at the time of the trial. The attention of prosecuting officers and of the judge who tried the cause may be directed to newly discovered facts, or to any of the circumstances of the case, and their recommendation in favor of a pardon may be sought. Whatever considerations may properly affect the action of the executive may be urged upon his attention. Even if there was any evidence in this case which would have justified the conclusion, as a matter of fact, that political influence, or any unlawful means, were expected to be exerted for the accomplishment of the end in view, no case was presented justifying the court in so declaring as a matter of law." *Moyer v. Cantieny*, 41 Minn. 242, 42 N. W. 1060.

*Compare Hatzfield v. Gulden*, 7 Watts (Pa.) 152, 31 Am. Dec. 750, wherein it was said: "A contract founded upon a promise or engagement to procure signatures and obtain a pardon from the governor for one convicted of a criminal offense and

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sentenced to punishment, is unlawful and cannot be enforced."

*Employment of Official as Attorney for Municipality.*—Where one who is mayor and councilman has, without collusion or fraud, been employed as an attorney to appear for the city and defend a suit brought against it, there is nothing in his official relations to the city to preclude his recovering the value of the services actually rendered under such employment. *Niles v. Muzzy*, 33 Mich. 61, 20 Am. Rep. 670.

<sup>1</sup> *Ormerod v. Dearman*, 100 Pa. St. 561, 45 Am. Rep. 391.

<sup>2</sup> *Treat v. Jones*, 28 Conn. 334.

*Contract to Procure Discharge of Drafted Man.*—In *Bowman v. Coffroth*, 59 Pa. St. 19, it was held that a contract to procure the discharge of a drafted man was against public policy and void, whether the compensation for the services was fixed or contingent.

<sup>3</sup> *Ormerod v. Dearman*, 100 Pa. St. 561, 45 Am. Rep. 391.

<sup>4</sup> See *Price v. Caperton*, 1 Duv. (Ky.) 208, wherein, however, compensation was allowed.

<sup>5</sup> *Bowman v. Phillips*, 41 Kan. 364, 21 Pac. 230, 13 Am. St. Rep. 292, 3 L.R.A. 631.

agreed to procure, or to endeavor to procure, the enactment of a particular law.<sup>6</sup> There is nothing necessarily inconsistent with the interests of justice in the acceptance of a retainer which will require the attorney to advocate views of the law different from those maintained by him on other occasions.<sup>7</sup>

**§ 435. Contracts Restricting Settlement by Client.**—Public policy forbids that an attorney at law should so arrange with his clients for an interest in the subject-matter of the litigation as to preclude the latter from compromising or settling the cause with the adverse party without the attorney's consent.<sup>8</sup> The

<sup>6</sup> *Trist v. Child*, 21 Wall. 441, 22 U. S. (L. ed.) 623; *Globe Works v. U. S.*, 45 Ct. Cl. 497; *In re Knapp*, 59 How. Pr. (N. Y.) 367, 8 Abb. N. Cas. 308; *Clippenger v. Hepbaugh*, 5 W. & S. (Pa.) 315; *Ormerod v. Dearman*, 100 Pa. St. 561, 45 Am. Rep. 391.

*Contract to Procure Suspension of Law.*—A contract by an attorney to secure the suspension for a specified time of a statute prohibiting the sale of intoxicating liquor is void, and he cannot recover the agreed compensation for so doing, although the only acts performed by him were the perfectly legal ones of agreeing to defend any prosecution brought under the statute. *Arlington Hotel Co. v. Ewing*, 124 Tenn. 536, Ann. Cas. 1913A 121, 138 S. W. 954, 38 L.R.A. (N.S.) 842.

<sup>7</sup> An attorney at law ought not to accept a retainer in a case when he believes that the law is against his client. It is not his duty, in order to subserve the interest of his client, to misstate the law and the facts, and if he be satisfied that the client cannot recover except by perversion of the law and the facts, the attorney ought not to take the case. But the fact that an attorney has, under a prior

retainer, advocated views of the law and facts different from those upon which his client rests his case, or has officially, as a judge or officer of the government, held a different view of the law and the rights of the parties, will not of itself disqualify him from accepting a retainer. An attorney has the right and privilege, possessed by all men and all officers and judges, to change his views upon the law and the facts of a case, when reason requires it. It would be absurd to say that a lawyer or judge, having once expressed an opinion upon legal questions, shall never change it, and that a judicial or official decision will forever bind the person announcing it. From the nature of legal questions which always depend upon the combination of facts for their correct decision, it is to be expected that lawyers will not always, in their solution, apply the same principles or reasoning. *Smith v. C. & N. W. R. Co.*, 60 Ia. 515, 15 N. W. 291.

<sup>8</sup> *Arkansas.*—*Davis v. Webber*, 66 Ark. 190, 49 S. W. 822, 74 Am. St. Rep. 81, 45 L.R.A. 196.

*Illinois.*—*North Chicago St. R. Co. v. Ackley*, 171 Ill. 100, 49 N. E. 222, 44 L.R.A. 177; *Cameron v. Borger*, 200

reason of this rule is that the law not only does not encourage litigation, but, on the contrary, it favors amicable settlements between the parties where they are fairly and honestly brought about.<sup>9</sup> The whole contract is affected by the invalidity of a stipulation

Ill. 84, 65 N. E. 690, 93 Am. St. Rep. 165, *affirming* 102 Ill. App. 649; *Granat v. Kruse*, 114 Ill. App. 488.

*Indiana*.—*Davis v. Chase*, 159 Ind. 242, 64 N. E. 88, 853, 95 Am. St. Rep. 294.

*Iowa*.—*Ellwood v. Wilson*, 21 Iowa 523; *Boardman v. Thompson*, 25 Iowa 487; *Kauffman v. Phillips*, 154 Iowa 542, 134 N. W. 575.

*Kansas*.—*Kansas City El. R. Co. v. Service*, 77 Kan. 316, 94 Pac. 262, 14 L.R.A.(N.S.) 1105.

*Kentucky*.—*Newport Rolling Mill Co. v. Hall*, 147 Ky. 598, 144 S. W. 760.

*Minnesota*.—*Gammons v. Johnson*, 69 Minn. 488, 72 N. W. 563. See also *Huber v. Johnson*, 68 Minn. 74, 70 N. W. 806, 64 Am. St. Rep. 456; *Anderson v. Itasea Lumber Co.*, 86 Minn. 480, 91 N. W. 12, 291; *Burho v. Carmichael*, 117 Minn. 211, Ann. Cas. 1913D 305, 135 N. W. 386.

*Mississippi*.—See *Mosely v. Jamison*, 71 Miss. 456, 14 So. 529.

*Nebraska*.—*Williams v. Miles*, 63 Neb. 851, 89 N. W. 455.

*New Jersey*.—*Weller v. Jersey City*, etc., R. Co., 68 N. J. Eq. 659, 6 Ann. Cas. 442, 61 Atl. 459.

*New York*.—*Lee v. Vacuum Oil Co.*, 126 N. Y. 579, 27 N. E. 1018; *Peri v. New York Cent., etc., R. Co.*, 152 N. Y. 521, 46 N. E. 849; *Fischer-Hansen v. Brooklyn Heights R. Co.*, 173 N. Y. 492, 66 N. E. 395; *In re Snyder*, 190 N. Y. 66, 13 Ann. Cas. 441, 82 N. E. 742, 123 Am. St. Rep. 533. *Compare* *Matter of Fernbacher*, 18 Abb. N. Cas.

1; *Syme v. Terry, etc., Co.*, 125 App. Div. 610, 110 N. Y. S. 25.

*Ohio*.—*Key v. Vattier*, 1 Ohio 132; *Lewis v. Lewis*, 15 Ohio 715; *Pennsylvania Co. v. Lombardo*, 49 Ohio St. 1, 29 N. E. 573, 14 L.R.A. 785; *Davy v. Fidelity, etc., Ins. Co.*, 78 Ohio St. 256, 85 N. E. 504, 125 Am. St. Rep. 694, 17 L.R.A.(N.S.) 443; *Emslie v. Ford Plate Glass Co.*, 25 Ohio Cir. Ct. Rep. 548.

*Oregon*.—*Jackson v. Stearns*, 48 Ore. 25, 84 Pac. 798, 5 L.R.A.(N.S.) 390.

*Pennsylvania*.—See *Murray's Estate*, 2 Pa. Dist. Ct. 681.

*South Dakota*.—*Howard v. Ward*, 139 N. W. 771.

*Utah*.—*Potter v. Ajax Min. Co.*, 22 Utah 273, 61 Pac. 999.

In *Wisconsin* a settlement by the client without the attorney's consent, contrary to a stipulation in the contract of employment, has been upheld, but the decision was based solely on the ground that a party having an unassignable cause of action cannot before verdict give his attorney an interest therein. *Kusterer v. Beaver Dam*, 56 Wis. 471, 14 N. W. 617, 43 Am. Rep. 725.

<sup>9</sup> *Arkansas*.—*Davis v. Webber*, 66 Ark. 190, 49 S. W. 822, 74 Am. St. Rep. 81, 45 L.R.A. 196.

*Illinois*.—*Cameron v. Boeger*, 200 Ill. 84, 65 N. E. 690, 93 Am. St. Rep. 165, *affirming* 102 Ill. App. 649; *Pratt v. Kerns*, 123 Ill. App. 86.

*Iowa*.—*Ellwood v. Wilson*, 21 Ia. 523.

restricting the client's right to settle,<sup>10</sup> unless, of course, the other provisions are separate and distinct therefrom; if they are, they may be enforced.<sup>11</sup> In Missouri it is held that an agreement of the kind under consideration may or may not be condemned, as against public policy, according to the circumstances of the case; each case must be judged in the light of its own facts.<sup>12</sup> In California, stipulations forbidding settlement by the client without the attorney's consent are held to be valid.<sup>13</sup> A similar rule prevails in Texas.<sup>14</sup> The voidability of contracts forbidding settlement

*Minnesota*.—Gammens v. Johnson, 76 Minn. 76, 78 N. W. 1035.

*Missouri*.—Wright v. Kansas City, etc., R. Co., 141 Mo. App. 518, 126 S. W. 517.

*New Jersey*.—Weller v. Jersey City, etc., R. Co., 68 N. J. Eq. 639, 6 Ann. Cas. 442, 61 Atl. 459.

*Oregon*.—Wagner v. Goldschmidt, 51 Ore. 63, 93 Pac. 689.

<sup>10</sup> Davis v. Webber, 66 Ark. 190, 49 S. W. 822, 74 Am. St. Rep. 81, 45 L.R.A. 196; Davis v. Chase, 159 Ind. 242, 64 N. E. 88, 853, 95 Am. St. Rep. 294; Kansas City El. R. Co. v. Service, 77 Kan. 316, 94 Pac. 262, 14 L.R.A.(N.S.) 1105. In re Snyder, 190 N. Y. 66, 13 Ann. Cas. 441, 82 N. E. 742, 123 Am. St. Rep. 533, 14 L.R.A.(N.S.) 1101.

<sup>11</sup> Granat v. Kruse, 114 Ill. App. 488; Anderson v. Itasca Lumber Co., 86 Minn. 480, 91 N. W. 12, 291; Howard v. Ward, (S. D.) 139 N. W. 771; Potter v. Ajax Min. Co., 22 Utah 273, 61 Pac. 999.

Thus where a contract of retainer between attorney and client provided that the attorney, as compensation for prosecuting the claim, should be entitled to receive forty per cent of any compromise or settlement before judgment, or, after judgment, forty per cent of any verdict or award, etc.,

and in a subsequent article of the contract, the client agreed not to settle or compromise the claim with any person or corporation without the consent in writing of the attorney, and that if such settlement were made without the attorney's consent, the client should pay to the attorney such part of the settlement as was thereinbefore agreed to be the attorney's share as compensation for services rendered; and the defendant settled with the client after issue joined, ignoring the rights of the attorney, it was held that the two clauses of the contract were separate and distinct, and that even though the latter were invalid as against public policy in binding the client not to settle, the prior clause fixing the amount of the attorney's compensation in case of settlement by the client was still binding, since the settlement was in fact made after issue joined. Syme v. Terry, etc., Co., 125 App. Div. 610, 110 N. Y. S. 25.

<sup>12</sup> Lipscomb v. Adams, 193 Mo. 530, 91 S. W. 1046, 112 Am. St. Rep. 500; Beagles v. Robertson, 135 Mo. App. 306, 115 S. W. 1042.

<sup>13</sup> Hoffman v. Vallejo, 45 Cal. 564.

<sup>14</sup> Ft. Worth, etc., R. Co. v. Carlock, 33 Tex. Civ. App. 202, 75 S. W. 931; Powell v. Galveston, etc., R. Co.,

by the client has been considered heretofore in connection with the discussion of champerty, barratry, and maintenance.<sup>15</sup>

**§ 436. Solicitation of Business.** — It has been held that an attorney who goes to the scene of a disaster and solicits persons having rights of action for injuries or death caused by such disasters to intrust him with the prosecution of their actions, is guilty of unprofessional conduct which bars his right to collect fees when such suits are compromised by the parties.<sup>16</sup> The reason given for this holding is that the conduct of the attorney was "contrary to the character of the profession and opposed to a sound public policy and to a proper and decorous administration of the law." So, where an attorney enters into a systematic scheme to hunt up claims, or supposed claims, upon which the original holders would probably never have asserted any right or brought any action, and to stir up wholesale litigation, and induce the bringing of actions by agreeing to prosecute suits at his own expense, indemnify his clients against the costs and expenses of litigation, accept for his compensation a share of what might be recovered, and agree not to charge anything for his services unless he was successful, his conduct is so clearly against public policy that the courts ought not to enforce the contract, or aid him in recovering the fruits of such a speculative and vicious scheme.<sup>17</sup> So, also a contract between an attorney at law and one who is not such an attorney, by which the latter agrees to procure the employment of the former by third persons for the prosecution of litigation, and also to assist in looking after and procuring witnesses whose testimony is to be used therein, in consideration of a share of the fees which the attorney shall receive for his services, is against public policy and void. Provisions of this nature have received statutory recognition in some jurisdictions.<sup>18</sup> Advertising for business has

(Tex.) 78 S. W. 975. See also Galveston, etc., R. Co. v. Ginther, 96 Tex. 295, 72 S. W. 166, *affirming* 30 Tex. Civ. App. 161, 70 S. W. 96.

<sup>15</sup> See *supra*, § 390.

<sup>16</sup> *Ingersoll v. Coal Creek Coal Co.*, 117 Tenn. 263, 10 Ann. Cas. 829, 98

S. W. 178, 119 Am. St. Rep. 1003, 9 L.R.A.(N.S.) 282.

<sup>17</sup> *Gammons v. Johnson*, 76 Minn. 76, 78 N. W. 1035.

<sup>18</sup> *California*.—*Alpers v. Hunt*, 86 Cal. 78, 24 Pac. 846, 21 Am. St. Rep. 17, 9 L.R.A. 483.

also been censured by the courts,<sup>19</sup> and in some instances has been considered sufficient cause for disbarment.<sup>20</sup> This subject has also been considered, heretofore, in connection with champerty, barratry, and maintenance.<sup>1</sup> A statute in New York applying indirectly to the solicitation of business by making illegal all contracts by which a contingent fee is to be shared with a third person not a lawyer, renders the contract of retainer void where such an agreement has been entered into.<sup>2</sup>

**§ 437. Contracts Affecting Marital Relations.**—A contract for compensation will, as a general rule, be declared void as against public policy where its purpose is the facilitating or procurement of a divorce,<sup>3</sup> separation,<sup>4</sup> or annulment of marriage;<sup>5</sup> and this is particularly true where the attorney's compensation is dependent on success, and is to be paid out of the amount allowed in the suit for alimony.<sup>6</sup> Thus, an attorney will not be allowed to

*Illinois.*—Vocke v. Peters, 58 Ill. App. 338.

*Massachusetts.*—Allen v. Hawks, 13 Pick. 79.

*Minnesota.*—Holland v. Sheehan, 108 Minn. 362, 17 Ann. Cas. 687, 122 N. W. 1, 23 L.R.A.(N.S.) 510.

*Nebraska.*—Langdon v. Conlin, 67 Neb. 243, 2 Ann. Cas. 834, 93 N. W. 389, 108 Am. St. Rep. 643, 60 L.R.A. 429.

*New York.*—N. Y. Penal Laws, § 274 (N. Y. Code Civ. Pro. § 74); In re Clark, 184 N. Y. 222, 77 N. E. 1; Oisher v. Lazzarone, 61 Hun 623 mem., 15 N. Y. S. 933.

<sup>19</sup> People v. McCabe, 18 Colo. 186, 32 Pac. 280, 36 Am. St. Rep. 270, 19 L.R.A. 231; People v. Taylor, 32 Colo. 250, 75 Pac. 914; People v. Goodrich, 79 Ill. 148.

<sup>20</sup> See *infra*, § 845.

<sup>1</sup> See *supra*, § 380. And see generally *supra*, §§ 379-399.

<sup>2</sup> In re Welch, 156 App. Div. 470, 141 N. Y. S. 381.

<sup>3</sup> *California.*—Newman v. Freitas, 129 Cal. 283, 61 Pac. 907, 50 L.R.A. 548.

*Indiana.*—McCabe v. Britton, 79 Ind. 224.

*Iowa.*—Barngrover v. Pettigrew, 128 Ia. 533, 104 N. W. 904, 111 Am. St. Rep. 206, 2 L.R.A.(N.S.) 260; Donaldson v. Eaton, 136 Ia. 650, 114 N. W. 19, 125 Am. St. Rep. 275, 14 L.R.A.(N.S.) 1168.

*Michigan.*—Jordan v. Westerman, 62 Mich. 170, 28 N. W. 826, 4 Am. St. Rep. 836.

<sup>4</sup> Van Vleck v. Van Vleck, 21 App. Div. 272, 47 N. Y. S. 470; Matter of Brackett, 114 App. Div. 257, 259, 260, 99 N. Y. S. 802.

<sup>5</sup> Donaldson v. Eaton, 136 Ia. 650, 114 N. W. 19, 125 Am. St. Rep. 275, 14 L.R.A.(N.S.) 1168.

<sup>6</sup> *Alabama.*—Brindley v. Brindley, 121 Ala. 429, 25 So. 751.

*Arkansas.*—McConnell v. McConnell, 98 Ark. 193, 136 S. W. 931, 33 L.R.A.(N.S.) 1074.

recover from his client for services "in the business of securing evidence" for a contemplated suit to obtain a separation of the client from his wife,<sup>7</sup> or for services which have a tendency to prevent a reconciliation between husband and wife.<sup>8</sup> While the invalidity of contracts affecting the marriage relation has been placed on various grounds, such as champerty and maintenance, good morals, and the nonassignability of the sum allowed by the court to the wife in such cases,<sup>9</sup> the best reason on which their invalidity has been predicated seems to be that public policy is interested in maintaining the family relation; that the interests of society require that those relations shall not be lightly severed, and that families shall not be broken up for inadequate causes or from unworthy motives; and that where differences have arisen which threaten disruption, public welfare and the good of society demand a reconciliation, if practicable or possible. Therefore, contracts which tend directly to prevent such reconciliation, or to bring about the alienation of husband and wife, are deemed to be void.<sup>10</sup>

*Recovery on Quantum Meruit for Services Performed under Void or Voidable Contracts.*

§ 438. Generally. — The general rule undoubtedly is that an attorney is not precluded from recovering compensation for val-

*California.*—*Sharon v. Sharon*, 75 Cal. 1, 16 Pac. 345; *White v. White*, 86 Cal. 212, 24 Pac. 1030; *Newman v. Freitas*, 129 Cal. 283, 61 Pac. 907, 50 L.R.A. 548.

*Michigan.*—*Jordan v. Westerman*, 62 Mich. 170, 28 N. W. 826, 4 Am. St. Rep. 836; *McCurdy v. Dillon*, 135 Mich. 678, 98 N. W. 746.

*New Jersey.*—*Lynde v. Lynde*, 64 N. J. Eq. 736, 52 Atl. 694, 97 Am. St. Rep. 692, 58 L.R.A. 471.

*New York.*—*Van Vleck v. Van Vleck*, 21 App. Div. 274, 47 N. Y. S. 470; *Matter of Brackett*, 114 App. Div. 257, 99 N. Y. S. 802.

<sup>7</sup> *Barngrover v. Pettigrew*, 128 Ia.

533, 104 N. W. 904, 111 Am. St. Rep. 206, 2 L.R.A. (N.S.) 260; *Succession of Elliot*, 28 La. Ann. 183.

<sup>8</sup> *Jordan v. Westerman*, 62 Mich. 170, 28 N. W. 826, 4 Am. St. Rep. 836.

<sup>9</sup> *Newman v. Freitas*, 129 Cal. 283, 61 Pac. 907, 50 L.R.A. 548; *Jordan v. Westerman*, 62 Mich. 170, 28 N. W. 826, 4 Am. St. Rep. 836; *McCurdy v. Dillon*, 135 Mich. 678, 98 N. W. 746; *Lynde v. Lynde*, 64 N. J. Eq. 736, 52 Atl. 694, 97 Am. St. Rep. 692, 58 L.R.A. 471.

<sup>10</sup> *Jordan v. Westerman*, 62 Mich. 170, 28 N. W. 826, 4 Am. St. Rep. 836.

uable services by the mere fact that such services were rendered under a void or voidable contract. There can, of course, be no recovery on the contract, but where it is not inherently *malum in se* or *malum prohibitum* the attorney may recover the reasonable value of his services on a *quantum meruit*.<sup>11</sup> Where, however, the contract is of such a nature as to be inherently obnoxious, the law will not imply a promise to remunerate the attorney for any services rendered thereunder;<sup>12</sup> thus in some jurisdictions no recovery may be had for services performed under a champertous agreement.<sup>13</sup> So, it has been held that an attorney cannot recover under a contract whereby he agreed to pay the costs and expenses of litigation;<sup>14</sup> or where he agrees to procure or facilitate the

<sup>11</sup> *Alabama*.—*Holloway v. Lowe*, 1 Ala. 246; *Elliott v. McClelland*, 17 Ala. 206; *Goodman v. Walker*, 30 Ala. 482, 68 Am. Dec. 134.

*Arkansas*.—*Davis v. Webber*, 66 Ark. 190, 49 S. W. 822, 74 Am. St. Rep. 81, 45 L.R.A. 196.

*California*.—*Buck v. Eureka*, 124 Cal. 61, 56 Pac. 612.

*Illinois*.—*Granat v. Kruse*, 114 Ill. App. 488, writ of error dismissed in 213 Ill. 328, 72 N. E. 744; *Dreyfuss v. Jones*, 116 Ill. App. 75; *Papineau v. White*, 117 Ill. App. 51.

*Indiana*.—*Zeigler v. Mize*, 132 Ind. 403, 31 N. E. 945; *French v. Cunningham*, 149 Ind. 632, 49 N. E. 797.

*Iowa*.—*Hyatt v. Burlington, etc.*, R. Co., 68 Ia. 662, 27 N. W. 815.

*Kentucky*.—*Rust v. Larne*, 4 Litt. 412, 14 Am. Dec. 172; *Caldwell v. Shepherd*, 6 T. B. Mon. 389; *Bowser v. Patrick*, 65 S. W. 824, 23 Ky. L. Rep. 1578; *Leonard v. Boyd*, 71 S. W. 508, 24 Ky. L. Rep. 1320.

*Massachusetts*.—*Thurston v. Percival*, 1 Pick. 415.

*Michigan*.—*Cadman v. Markle*, 76 Mich. 448, 43 N. W. 315, 5 L.R.A. 707; *McCurdy v. Dillon*, 135 Mich. 678, 98 N. W. 746.

*Minnesota*.—*Gammons v. Johnson*, 69 Minn. 488, 72 N. W. 563.

*Missouri*.—*Wright v. Kansas City, etc.*, R. Co., 141 Mo. App. 518, 126 S. W. 517.

*New York*.—*In re Snyder*, 190 N. Y. 66, 13 Ann. Cas. 441, 82 N. E. 742, 123 Am. St. Rep. 533, 14 L.R.A. (N.S.) 1101.

*Utah*.—*Potter v. Ajax Min. Co.*, 22 Utah 273, 61 Pac. 999.

*Washington*.—*Atwood v. Sicade*, 131 Pac. 850.

*Wisconsin*.—*Stearns v. Felker*, 28 Wis. 294.

<sup>12</sup> *Arlington Hotel Co. v. Ewing*, 124 Tenn. 536, Ann. Cas. 1913A 121, 138 S. W. 954, 38 L.R.A. (N.S.) 842.

<sup>13</sup> *Butler v. Legro*, 62 N. H. 350, 13 Am. St. Rep. 573. And as to champerty, barratry, and maintenance, see generally *supra*, §§ 379-399.

<sup>14</sup> *Moreland v. Devenney*, 72 Kan. 471, 83 Pac. 1097; *Willemín v. Bateson*, 63 Mich. 309, 29 N. W. 734; *Roller v. Murray*, 112 Va. 780, Ann. Cas. 1913B 1088, 72 S. E. 665, 38 L.R.A. (N.S.) 1202. See also *supra*, § 389.

*Contra*.—*Stearns v. Felker*, 28 Wis.



procurement of a divorce, or a separation, or an annulment of marriage.<sup>15</sup> Nor can an attorney recover the reasonable value of his services in prosecuting suits where the contract with the client was not only champertous, but was a part of an unlawful and vexatious scheme by which the litigation itself was worked up and instigated.<sup>16</sup> So, an attorney will be prevented from recovering on a *quantum meruit* for services rendered under a contract whereby he agreed to defend a client from future violations of the penal laws.<sup>17</sup> As to compensation for services rendered prior to the making of the objectionable agreement, however, there is no hindrance to a recovery.<sup>18</sup>

594. See also *Brush v. Carbondale*, 229 Ill. 144, 11 Ann. Cas. 121, 82 N. E. 252.

<sup>15</sup> *Barngrover v. Pettigrew*, 128 Ia. 533, 104 N. W. 904, 111 Am. St. Rep. 206, 2 L.R.A.(N.S.) 260; *Donaldson v. Eaton*, 136 Ia. 650, 114 N. W. 19, 125 Am. St. Rep. 275, 14 L.R.A.(N.S.) 1168. And see *supra*, § 437. But compare *Crow v. Yocom*, 11 Rob. (La.) 506.

<sup>16</sup> *Gammons v. Johnson*, 76 Minn. 76, 78 N. W. 1035. See also *supra*, § 380.

The vice of such contracts lies deeper and much further back than merely entering into a champertous agreement for compensation for lawful services performed in the prosecution of suits legitimately instituted. Their illegality enters into the very inception of the scheme by which the litigation itself is instigated, and but for which it would never have existed.

Even if the special written contracts regarding compensation are set aside or ignored, this original vice, in the very inception of the scheme, would still exist in full force. To hold that a party can thus illegally stir up and instigate litigation, and yet obtain the benefits of it by ignoring the special contracts, and bringing suit upon a *quantum meruit* for services performed in prosecuting the litigation which he has unlawfully instigated, would be a travesty on justice, and permit a party to do indirectly what he cannot do directly. *Gammons v. Johnson*, 76 Minn. 76, 78 N. W. 1035.

<sup>17</sup> *Bowman v. Phillips*, 41 Kan. 364, 21 Pac. 230, 13 Am. St. Rep. 292, 3 L.R.A. 631. See also *supra*, § 434.

<sup>18</sup> *Thurston v. Pereival*, 1 Pick. (Mass.) 415; *Lathrop v. Amherst Bank*, 9 Met. (Mass.) 489.

## CHAPTER XXI.

### AMOUNT, RETENTION, AND ALLOWANCE OF COMPENSATION, TAXABLE COSTS, AND EXPENSES.

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*Under Express Contract.*

§ 439. **Contract Controls.**—Where an attorney enters into a valid contract with his client whereby the amount of the attorney's compensation is definitely fixed, such contract will, of course, be controlling in this respect; and the client is bound to pay, and the attorney to receive as payment in full for his services, the sum so stipulated.<sup>1</sup>

<sup>1</sup>*United States.*—*Wylie v. Cox*, 15 How. 415, 14 U. S. (L. ed.) 753; *Owen v. Dudley*, 217 U. S. 488, 30 S. Ct. 602, 54 U. S. (L. ed.) 851, *affirming* 31 App. Cas. (D. C.) 177; *Salinger v. Mason*, 194 Fed. 382, 114 C. C. A. 300.

*Arkansas.*—*Davis v. Webber*, 66 Ark. 190, 49 S. W. 822, 74 Am. St. Rep. 81, 45 L.R.A. 196.

*Colorado.*—*Hazeltine v. Brockway*, 26 Colo. 291, 57 Pac. 1077; *Foot v. Smythe*, 20 Colo. App. 320, 78 Pac. 619.

*Georgia.*—*Bull v. St. John*, 39 Ga. 78; *Coker v. Oliver*, 4 Ga. App. 728, 62 S. E. 483.

*Illinois.*—*Hughes v. Zeigler*, 69 Ill. 38; *Elliott v. Rubel*, 132 Ill. 9, 23 N. E. 400, *reversing* 30 Ill. App. 62; *Gorrell v. Payson*, 170 Ill. 213, 48 N. E. 433, *reversing* 68 Ill. App. 641; *Calkins v. Pease*, 125 Ill. App. 270.

*Indiana.*—*Whinery v. Brown*, 36 Ind. App. 276, 75 N. E. 605; *Cordes v. Bailey*, 39 Ind. App. 83, 78 N. E. 678, 1060.

*Iowa.*—*Gaston v. Austin*, 52 Iowa 35, 2 N. W. 609; *Gillilland v. Brantner*, 145 Iowa 275, 121 N. W. 1047.

*Kentucky.*—*Mellvoy v. Russell*, 12 S. W. 1067; *Townsend v. Rhea*, 38 S. W. 865, 18 Ky. L. Rep. 901.

*Maryland.*—*Etzel v. Duncan*, 112 Md. 346, 76 Atl. 493.

*Michigan.*—*Cavanaugh v. Robinson*, 138 Mich. 554, 101 N. W. 824.

*Mississippi.*—*Clifton v. Clark*, 84 Miss. 795, 37 So. 746; *Nathan v. Halsell*, 91 Miss. 785, 45 So. 856.

*Missouri.*—*State v. Hawkins*, 28 Mo. 366; *Boyd v. G. W. Chase, etc., Co.*, 135 Mo. App. 115, 115 S. W. 1052; *Beagles v. Robertson*, 135 Mo. App. 306, 115 S. W. 1042; *Bond v. Sandford*, 134 Mo. App. 477, 114 S. W. 570.

*Nebraska.*—*In re Rapp*, 77 Neb. 674, 110 N. W. 661.

*New Jersey.*—*Scott v. New York, etc., Co.*, 79 N. J. L. 231, 75 Atl. 772.

*New York.*—*In re Department of Public Works*, 167 N. Y. 501, 60 N. E. 781, *modifying* 58 App. Div. 459, 69 N. Y. S. 413; *Bassford v. Johnson*, 172 N. Y. 488, 65 N. E. 260, *modifying* 71 App. Div. 617, 76 N. Y. S. 1009; *Batterson v. Osborne*, 63 Hun 633 mem., 18 N. Y. S. 431; *Jackson v. Stone*, 48 App. Div. 628, 64 N. Y. S. 820; *Deering v. Schreyer*, 58 App. Div. 322, 68 N. Y. S. 1015, *reversed* on other grounds, 171 N. Y. 451, 64 N. E. 179; *Werner v. Knowlton*, 107 App. Div. 158, 94 N. Y. S. 1054; *Burke v. Baker*, 111 App. Div. 422, 97 N. Y. S. 768, *affirmed* 188 N. Y. 561, 80 N. E. 1033; *McDonald v. De Vito*, 118 App. Div. 566, 103 N. Y. S. 508; *Syme v. Terry, etc., Co.*, 125 App. Div. 610, 110 N. Y. S. 25;

This rule is equally effective where the amount of compensation is to be a certain percentage of the sum recovered, or where the attorney's right thereto, in whole or in part, is contingent on success.<sup>2</sup>

It is immaterial that, in order to accomplish the purpose of his employment, the attorney was obliged to render services which

*Brackett v. Ostrander*, 126 App. Div. 529, 110 N. Y. S. 779; *In re Edgecombe Road*, 128 App. Div. 432, 112 N. Y. S. 845; *In re Winkler*, 154 App. Div. 532, 139 N. Y. S. 755; *Bogan v. Wright*, 22 Misc. 94, 48 N. Y. S. 546; *Allen v. Flynn*, 52 Misc. 121, 101 N. Y. S. 747; *In re Knapp*, 59 How. Pr. 367, 8 Abb. N. Cas. 308.

*Oregon*.—*Bingham v. Salene*, 15 Ore. 208, 14 Pac. 523, 3 Am. St. Rep. 152; *Hamilton v. Holmes*, 48 Ore. 453, 87 Pac. 154.

*Pennsylvania*.—*McGee's Estate*, 205 Pa. St. 590, 55 Atl. 776.

*Tennessee*.—*Pate v. Maples*, 43 S. W. 740.

*Texas*.—*Thomas v. Morrison*, 92 Tex. 329, 48 S. W. 500, *modifying* 46 S. W. 46; *Texas Cent. R. Co. v. Andrews*, 28 Tex. Civ. App. 477, 67 S. W. 923. See also *First Nat. Bank v. Hodges*, 62 S. W. 827.

*Utah*.—*Potter v. Ajax Min. Co.*, 22 Utah 273, 61 Pac. 999.

*Vermont*.—*Noble v. Bellows*, 53 Vt. 527.

*Washington*.—*Schultheis v. Nash*, 27 Wash. 250, 67 Pac. 707; *Carson v. Fogg*, 34 Wash. 448, 76 Pac. 112; *Cain v. Moore*, 54 Wash. 627, 103 Pac. 1130.

*West Virginia*.—*Camden v. McCoy*, 48 W. Va. 377, 37 S. E. 637.

*Wisconsin*.—*Cotzhausen v. Central Trust Co.*, 79 Wis. 613, 49 N. W. 158; *Sheehy v. Duffy*, 89 Wis. 6, 61 N. W. 295.

<sup>2</sup> *United States*.—*Ryan v. Philadelphia, etc., Coal, etc., Co.*, 189 Fed. 253.

*Colorado*.—*Leitensdorfer v. King*, 7 Colo. 436, 4 Pac. 37.

*Georgia*.—*Coker v. Oliver*, 4 Ga. App. 728, 62 S. E. 483.

*Iowa*.—*Graham v. Dubuque Specialty Mach. Works*, 138 Ia. 456, 114 N. W. 619, 15 L.R.A.(N.S.) 729.

*Kansas*.—*Stevens v. Sheriff*, 76 Kan. 124, 90 Pac. 799, 11 L.R.A.(N.S.) 1153.

*Kentucky*.—*McIlvoy v. Russell*, 12 S. W. 1067.

*Louisiana*.—*Andirac v. Richardson*, 125 La. 883, 51 So. 1024.

*Missouri*.—*Humphreys v. McLachlan*, 87 Miss. 532, 40 So. 151.

*New York*.—*In re Fitzsimons*, 174 N. Y. 15, 66 N. E. 554, *reversing* 77 App. Div. 345, 12 N. Y. Ann. Cas. 250, 79 N. Y. S. 194; *Ransom v. Cutting*, 112 App. Div. 150, 98 N. Y. S. 282, *affirmed* 188 N. Y. 447, 81 N. E. 324; *McDonald v. De Vito*, 118 App. Div. 566, 103 N. Y. S. 508.

*Ohio*.—*Hudson v. Sanders*, 10 Ohio Cir. Dec. 342, 19 Ohio Cir. Ct. 615.

*Virginia*.—*McDonald v. Logan*, 34 S. E. 490.

*West Virginia*.—*Crumlish v. Shenandoah Valley R. Co.*, 40 W. Va. 627, 22 S. E. 90.

Under an agreement to pay an attorney one third of the recovery if under \$12,000, otherwise one fourth, an attorney was held entitled to one

he had not anticipated,<sup>3</sup> or that the compensation fixed by the contract is inadequate,<sup>4</sup> or unreasonable.<sup>5</sup> The power of the courts to reform contracts between attorney and his client is limited to the duty of protecting the latter against the undue influence of the former; they cannot increase the amount of compensation agreed upon by the parties as the value of the attorney's services.<sup>6</sup> Nor will the accrued right of the attorney to compensation be affected by the assignment of the cause of action by the client to a third person.<sup>7</sup>

The contract will not be binding, however, where it appears to have been abandoned,<sup>8</sup> superseded,<sup>9</sup> or substantially modified.<sup>10</sup> So, the client will not be bound by the contract where there has been unfair dealing on the part of the attorney,<sup>11</sup> or where the contract is tainted with any other illegality,<sup>12</sup> or where the parties did not mutually understand the terms of the contract;<sup>13</sup> nor will the attorney be held to an agreement which he was induced to

third, where a judgment for \$11,500 was affirmed after interest had accrued, so that the aggregate sum collected exceeded \$12,000. *Sanders v. Riddick*, (Tenn.) 156 S. W. 464.

As to the validity of contingent fees generally, see *supra*, §§ 421-427.

<sup>3</sup> *Payne v. Davis County*, 150 Ia. 597, 129 N. W. 823; *Murray v. Trumbull*, 62 Wash. 336, 113 Pac. 769.

<sup>4</sup> *Alabama*.—*Coopwood v. Wallace*, 12 Ala. 790.

*California*.—*Reynolds v. Sorosis Fruit Co.*, 133 Cal. 625, 66 Pac. 21.

*Kansas*.—*Topeka Water-Supply Co. v. Root*, 56 Kan. 187, 42 Pac. 715.

*Kentucky*.—*Mellvoy v. Russell*, 24 S. W. 3.

*Montana*.—*Walsh v. Helena School Dist.*, 17 Mont. 413, 43 Pac. 180.

<sup>5</sup> *Fuller v. Stevens*, (Ala.) 39 So. 623; *Ingersoll v. Morse*, 33 Miss. 667; *In re Rapp*, 77 Neb. 674, 110 N. W. 661.

<sup>6</sup> *Lewis v. Yale*, 4 Fla. 418.

<sup>7</sup> *Randall v. Archer*, 5 Fla. 438.

<sup>8</sup> *Holladay's Case*, 27 Fed. 830.

<sup>9</sup> *Brown v. Curtis*, 111 Ia. 542, 82 N. W. 945.

<sup>10</sup> Where an attorney agreed to conduct a formal friendly suit to quiet title for \$150, and, after the defendant filed a cross-complaint claiming title to the land, the suit ceased to be friendly, whereupon the client told the attorney to go ahead and fight the suit to a finish, which he did through two trials, there was a sufficient modification of the original employment to warrant a recovery on a *quantum meruit*. *Tong v. Orr*, 44 Ind. App. 681, 87 N. E. 147, *rehearing denied*, 44 Ind. App. 693, 88 N. E. 308.

<sup>11</sup> See *supra*, §§ 428-432.

<sup>12</sup> See *supra*, §§ 433-437.

<sup>13</sup> *Cooper v. Bell*, (Tenn.) 153 S. W. 844.

make by the fraudulent representations of the client,<sup>14</sup> or to one which the client has repudiated.<sup>15</sup>

**§ 440. Extra Compensation Denied.**—It is well settled that a contract to render professional services for a fixed sum covers all services which are ordinarily or necessarily incidental to the proper performance of the duties so undertaken by an attorney; and that, as to such services, no extra compensation can be recovered.<sup>16</sup> Thus as to services, in resisting an injunction, which were necessarily incidental to an action to foreclose a mortgage.<sup>17</sup> So, frequently the contract of employment includes services rendered on appeal,<sup>18</sup> and thereafter;<sup>19</sup> and may even extend to the trial of collateral suits.<sup>20</sup> And a specified percentage of the "recovery"

<sup>14</sup> *Fraud on Part of Client.*—If an attorney is induced by his client's misrepresentations to undertake his case for a contingent fee, he may treat the contract as a nullity, and recover upon an implied promise to pay him for services rendered. *Evans v. Bell*, 6 Dana (Ky.) 479.

<sup>15</sup> Where a client attempts to repudiate an agreement under which his attorney has acted in effecting a settlement, and his obligation thereon for services, the attorney is not bound by the amount of compensation stipulated, but is entitled to all his services were worth. *Foot v. Smythe*, 20 Colo. App. 320, 78 Pac. 619.

<sup>16</sup> *United States.*—*Hughes v. Dundee Mortg. Co.*, 140 U. S. 98, 11 S. Ct. 727, 35 U. S. (L. ed.) 354; *Page v. Truteh*, 5 Am. L. Rec. 155, 18 Fed. Cas. No. 10,668.

*California.*—*Reynolds v. Sorosis Fruit Co.*, 133 Cal. 625, 66 Pac. 21.

*Illinois.*—*Dyer v. Sutherland*, 75 Ill. 583; *Willard v. Pennsylvania Co.*, 140 Ill. App. 306.

*Iowa.*—*Lindsay v. Carpenter*, 90 Ia. 529, 58 N. W. 900.

*Kentucky.*—*McKay v. Lancaster*, 15 Ky. L. Rep. 159; *Sparks v. Walden*, 79 S. W. 248, 25 Ky. L. Rep. 1937.

*Mississippi.*—*Nathan v. Halsell*, 91 Miss. 785, 45 So. 856.

*New York.*—In re Maxwell, 51 Hun 640 mem., 4 N. Y. S. 576; *Welsh v. Old Dominion Min., etc., Co.*, 56 Hun 650, 10 N. Y. S. 174; In re Bowles, 58 Hun 609, 12 N. Y. S. 468; *Batterson v. Osborne*, 63 Hun 633 mem., 18 N. Y. S. 431; In re Schaller, 10 Daly 57; In re Knapp, 59 How. Pr. 367, 8 Abb. N. Cas. 308.

*Washington.*—*Niagara F. Ins. Co. v. Hart*, 13 Wash. 651, 43 Pac. 937.

<sup>17</sup> *Darrin v. Clay*, 143 App. Div. 937 mem., 128 N. Y. S. 346.

<sup>18</sup> *Cavanaugh v. Robinson*, 138 Mich. 554, 101 N. W. 824, 11 Detroit Leg. N. 675; *Niagara F. Ins. Co. v. Hart*, 13 Wash. 651, 43 Pac. 937.

<sup>19</sup> *Tuttle v. Chalin*, 88 Fed. 122, 59 U. S. App. 602, 31 C. C. A. 419.

<sup>20</sup> *Moses v. Bagley*, 55 Ga. 283.

limits the fee to that stipulated, though suit was necessary to make the collection.<sup>1</sup>

Nor can an attorney recover extra compensation for the performance of unauthorized acts<sup>2</sup> or the employment of associate counsel without the consent of the client.<sup>3</sup> It has also been held that the defense of a county by an attorney, against a bill filed to enjoin the issuance of bonds, was a matter "pertaining to the building and construction of turnpikes or macadamized roads," within the meaning of a contract with such county providing for a certain fee for services in all matters pertaining to the building of turnpikes or macadamized roads, and in all matters that may come before the county board in relation thereto.<sup>4</sup>

**§ 441. Extra Compensation Allowed.**—The mere fact that an attorney performs professional services under a contract, wherein the amount of compensation to be received by him is fixed, does not, of course, preclude him from recovering for services which were not contemplated by the contract of employment.<sup>5</sup> Thus,

<sup>1</sup> *Wolfe v. Mack*, 81 Misc. 185, 142 N. Y. S. 433.

<sup>2</sup> *Baldwin v. School City*, 73 Ind. 346; *Timberlake v. Crosby*, 81 Me. 249, 16 Atl. 896.

<sup>3</sup> *Hughes v. Zeigler*, 69 Ill. 38; *In re Borkstrom*, 63 App. Div. 7, 71 N. Y. S. 451, *affirmed* 168 N. Y. 639, 61 N. E. 1127. See also *supra*, § 210.

<sup>4</sup> *Lindsay v. Colbert County*, 112 Ala. 409, 20 So. 637.

<sup>5</sup> *United States*.—*Barens v. Sherwood*, 136 Fed. 184, 69 C. C. A. 200, *affirming* 130 Fed. 364.

*Alabama*.—*State Bank v. Martin*, 4 Ala. 615; *Humes v. Decatur Land Improvement & Furnace Co.*, 98 Ala. 461, 13 So. 368.

*California*.—*Mahoney v. Bergin*, 41 Cal. 423.

*Illinois*.—*Dyer v. Sutherland*, 75 Ill. 583; *Singer v. Steele*, 125 Ill. 126, 17 N. E. 751; *Sanders v. Seelye*, 128 Ill. 631, 21 N. E. 601.

*Indiana*.—*Judah v. Vincennes University*, 16 Ind. 56; *Check v. Schwartz*, 70 Ind. 339; *United States Mortg. Co. v. Henderson*, 111 Ind. 24, 12 N. E. 88; *Louisville, etc., R. Co. v. Reynolds*, 118 Ind. 170, 20 N. E. 711; *Ohio, etc., R. Co. v. Smith*, 5 Ind. App. 36, 31 N. E. 371; *Cordes v. Bailey*, 39 Ind. App. 83, 78 N. E. 678, 1060.

*Massachusetts*.—*Pierce v. Parker*, 121 Mass. 403.

*Missouri*.—*Comstock v. Flower*, 109 Mo. App. 275, 84 S. W. 207; *Bond v. Sandford*, 134 Mo. App. 477, 114 S. W. 570; *Rollins v. Schawacker*, 153 Mo. App. 284, 133 S. W. 409.

*New York*.—*In re Bowles*, 58 Hun 609 mem., 12 N. Y. S. 468; *Seraf v. Smith*, 61 Hun 36, 15 N. Y. S. 330; *Allen v. Baker*, 29 Misc. 337, 60 N. Y. S. 472.

*Pennsylvania*.—*Pike v. Ziegler*, 4 Kulp 441.



unless the terms of the contract preclude it, extra compensation may be recovered for services rendered on appeal.<sup>6</sup> So, an attorney who undertakes to foreclose a mortgage for a fixed compensation if no defense is made, is entitled to a reasonable fee for prosecuting against a vigorous defense.<sup>7</sup> And an attorney agreeing, for a fixed fee, to foreclose a mechanic's lien, and "to perform any and all work necessary in and for the complete foreclosure" thereof, is not required to defend, without additional compensation, a motion, not based upon his errors, to vacate the judgment of foreclosure obtained by him.<sup>8</sup> A contract for compensation for services to be rendered in a damage suit does not, as a matter of law, include services rendered in assisting in the defense of criminal proceedings, even though recovery in the damage suit is dependent on the result of the criminal prosecution;<sup>9</sup> nor do counsel who undertake to defend a client upon a criminal accusation, thereby agree to defend his bailors upon a *scire facias* on the recognizance.<sup>10</sup> Whether the services for which extra compensation is asked are within the contract of employment is a question for the jury where the evidence in relation thereto presents a conflict;<sup>11</sup> but in the absence of such a conflict, or inherent ambiguity, the construction of the contract is, of course, for the court.<sup>12</sup>

§ 442. Amount Not Definitely Fixed. — There are many instances of valid contracts for compensation which, instead of

*South Carolina*.—Haines *v.* Wilson, 85 S. C. 338, 67 S. E. 311.

*South Dakota*.—Cranmer *v.* Brothers, 15 S. D. 234, 88 N. W. 105.

*Texas*.—Ker *v.* Paschal, 1 Pacey, Unrep. Cas. 692; Clarke *v.* Faver, 40 S. W. 1009.

*Washington*.—Isham *v.* Parker, 3 Wash. 755, 29 Pac. 835.

*West Virginia*.—Watts *v.* West Virginia So. R. Co., 48 W. Va. 262, 37 S. E. 700; Fisher *v.* Mylius, 62 W. Va. 19, 57 S. E. 276.

<sup>6</sup>Sanders *v.* Seelye, 128 Ill. 631, 21 N. E. 601; Bartholomew *v.* Langs-Attys. at L. Vol. II.—49.

dale, 35 Ind. 278; Calvert *v.* Coxe, 1 Gill (Md.) 95; Taggart *v.* Hower, (Pa.) 17 Atl. 13.

<sup>7</sup>Murray *v.* Trumbull, 62 Wash. 336, 113 Pac. 769.

<sup>8</sup>Cranmer *v.* Brothers, 15 S. D. 234, 88 N. W. 105.

<sup>9</sup>Correll *v.* Payson, 170 Ill. 213, 48 N. E. 433, reversing 68 Ill. App. 641.

<sup>10</sup>Headley *v.* Good, 24 Tex. 232.

<sup>11</sup>Beard *v.* Morgan, 71 Ill. App. 564; Dodge *v.* Janvrin, 59 N. H. 16.

<sup>12</sup>Serfat *v.* Smith, 61 Hun 36, 15 N. Y. S. 330.

fixing a definite sum, provide for a "reasonable" remuneration,<sup>13</sup> or a "good" fee,<sup>14</sup> or an amount "to be fixed by the client,"<sup>15</sup> even though such compensation is also dependent on success.<sup>16</sup> A contract between attorney and client for the rendition of legal services in connection with an estate to which the client was an heir, providing that the attorney's compensation should "in no event be more" than that received from other heirs similarly interested, nor more than a certain per cent of the amount recovered for the client, does not fix the amount of compensation, but merely imposes maximum limits thereto, leaving the amount to be determined on a *quantum meruit*, within such limits.<sup>17</sup> Nor does an agreement by a lawyer that his charge for presenting a case on appeal would not exceed a specified sum unless there was more in the case than he then knew of, made on the representation of his client, who also was an attorney, that only two questions were involved in the appeal, prevent the lawyer from recovering extra compensation, where six questions arose in the case instead of two, and were briefed and argued by him.<sup>18</sup> So where an attorney, in fixing his fee, said to his client: "It may cost you three thousand dollars; it may cost you five, with all expenses included," it was held that this statement did not prove a contract that all the expenses of the litigation should not exceed five thousand dollars.<sup>19</sup>

<sup>13</sup> *Alabama*.—*State Bank v. Martin*, 4 Ala. 615.

*Kentucky*.—*Nesbitt v. Whaley*, 10 Ky. L. Rep. 400 (abstract).

*Michigan*.—*Walbridge v. Barrett*, 118 Mich. 433, 76 N. W. 973, 5 Detroit Leg. N. 562.

*Nebraska*.—*Cressman v. Whitall*, 16 Neb. 592, 21 N. W. 458.

*New Jersey*.—*Strong v. Mundy*, 52 N. J. Eq. 833, 31 Atl. 611, *reversing* 52 N. J. Eq. 744, 30 Atl. 322.

*New York*.—*Wallis v. Loubat*, 2 Den. 607.

*Tennessee*.—*Pate v. Maples*, 43 S. W. 740.

<sup>14</sup> *Fairbanks v. Weeber*, 15 Colo. App. 268, 62 Pac. 368.

<sup>15</sup> *Roche v. Baldwin*, 135 Cal. 522, 65 Pac. 459, 67 Pac. 903; *In re Maxwell*, 51 Hun 640 mem., 4 N. Y. S. 576; *Tennant v. Fawcett*, 94 Tex. 111, 58 S. W. 824, *reversing* 55 S. W. 611; *Howe v. Kenyon*, 4 Wash. 677, 30 Pac. 1058.

<sup>16</sup> The value of attorney's services is not affected by a contingent agreement to charge only what they were reasonably worth if successful, and nothing if unsuccessful. *Walbridge v. Barrett*, 118 Mich. 433, 76 N. W. 973, 5 Detroit Leg. N. 562.

<sup>17</sup> *Russell v. Young*, 94 Fed. 45, 36 C. C. A. 71.

<sup>18</sup> *Bond v. Sandford*, 134 Mo. App. 477, 114 S. W. 570.

<sup>19</sup> *Dickerson v. Scheuer*, 56 Super.

In all such instances, excepting, possibly, where "the client is to fix the fee,"<sup>20</sup> there may be a recovery on a *quantum meruit*<sup>1</sup> in accordance with the principles stated under the following subdivision of this chapter.<sup>2</sup>

### § 443. Counsel Substituted by Original Attorney.—

Where the original counsel substitutes another in his stead with the knowledge of the client, who accepts the benefits of his services, the substituted counsel is entitled to the amount of compensation provided for in the contract between the client and the counsel originally retained;<sup>3</sup> but, in the absence of a new agreement providing therefor, he cannot claim any more than the sum so stipulated.<sup>4</sup> This rule does not apply, of course, to cases where the client engages the services of another attorney who, subsequently, has been substituted as counsel of record in the case. In such cases the new attorney is at liberty to make any agreement which he might have made had he been selected originally.<sup>5</sup>

Ct. 605, 1 N. Y. S. 419, *affirmed* 121 N. Y. 671, 24 N. E. 1094.

<sup>20</sup> Where an attorney contracts to serve his client for such a fee as the client may think reasonable, and be able to pay, the client, acting in good faith and according to his ability, is sole judge as to the reasonableness of the fee and his ability to pay. *Howe v. Kenyon*, 4 Wash. 677, 30 Pac. 1058. And see to the same effect: *Roehe v. Baldwin*, 135 Cal. 522, 65 Pac. 459, 67 Pac. 903; *In re Maxwell*, 51 Hun 640 mem., 4 N. Y. S. 576; *Tennant v. Fawcett*, 94 Tex. 111, 58 S. W. 824.

<sup>1</sup> *Fairbanks v. Weeber*, 15 Colo. App. 268, 62 Pac. 368. And see all the cases cited throughout this section.

Where a client agrees to pay his attorney reasonable compensation for his services, the question of what is reasonable compensation is purely one of fact upon which the client has

a constitutional right to take the verdict of a jury, and the attorney's only remedy is in an action at law for a breach of the promise to pay. *Story v. Hull*, 143 Ill. 506, 32 N. E. 265.

Where legal services have been performed under a contract providing that the fee should be such as any gentleman of the profession should consider reasonable, and the client has refused to so submit the ascertainment of the value of the services, a recovery can be had on a *quantum meruit*. *State Bank v. Martin*, 4 Ala. 615.

<sup>2</sup> See *infra*, §§ 447-449.

<sup>3</sup> *Reese v. Resburgh*, 54 App. Div. 378, 66 N. Y. S. 633.

<sup>4</sup> *Ennis v. Hultz*, 46 Ia. 76; *Herdon v. Lammers*, (Tex.) 55 S. W. 414.

<sup>5</sup> *Cowles v. Thompson*, 31 Neb. 479, 48 N. W. 145.

As to substitution generally, see *supra*, §§ 143-150.

§ 444. **Associate or Additional Counsel.** — The agreement for compensation between the client and his original counsel will not bind additional or associate counsel subsequently employed by the client, unless, of course, such other counsel agrees to have his compensation so fixed. Counsel so retained are at liberty to contract for the amount which they are to receive independently of the agreement with the attorney first employed.<sup>6</sup> Nor will the fees of the original attorney be affected by the amount paid to such associate or additional counsel.<sup>7</sup> An agreement between the attorney of record and his associate as to the latter's fees is not binding on the client.<sup>8</sup>

§ 445. **Covenant in Mortgage Fixing Attorney Fee for Foreclosure.** — The general rule is that, in the absence of controlling statutory regulation, a covenant in a mortgage fixing the amount of an attorney fee for the foreclosure thereof, if not unreasonable, is binding on the parties;<sup>9</sup> but in some jurisdictions

<sup>6</sup> *Gates v. McClenahan*, (1a.) 103 N. W. 969; *Bissell v. Zorn*, 122 Mo. App. 688, 99 S. W. 458; *Cowles v. Thompson*, 31 Neb. 479, 48 N. W. 145; *Goldthwaite v. Dent*, 3 McCord L. (S. C.) 296.

<sup>7</sup> *California*.—*Luco v. De Toro*, 91 Cal. 495, 18 Pac. 866, 27 Pac. 1082.

*Florida*.—*Randall v. Archer*, 5 Fla. 438.

*Minnesota*.—*Moyer v. Cantieny*, 41 Minn. 242, 42 N. W. 1060.

*New York*.—*In re Hynes*, 105 N. Y. 560, 12 N. E. 60.

*Washington*.—*Isham v. Parker*, 3 Wash. 755, 29 Pac. 835.

<sup>8</sup> *Harwood v. La Grange*, 137 N. Y. 538, 32 N. E. 1000, *reversing* 62 Hun 619 *mem.*, 16 N. Y. S. 689.

See also *supra*, § 210.

<sup>9</sup> *Dakota*.—*Hovey v. Edmison*, 3 Dak. 119, 22 N. W. 594.

*Illinois*.—*Helfron v. Gage*, 119 Ill. 182, 36 N. E. 569; *Mulecahey v.*

*Strauss*, 151 Ill. 70, 37 N. E. 702; *Primley v. Shirk*, 163 Ill. 389, 45 N. E. 247; *Abbott v. Stone*, 172 Ill. 634, 50 N. E. 328, 64 Am. St. Rep. 60; *Culver v. Brinkerhoff*, 180 Ill. 548, 54 N. E. 585; *Thornton v. Commonwealth Loan, etc., Assoc.*, 181 Ill. 456, 54 N. E. 1037; *Baker v. Jacobson*, 183 Ill. 171, 55 N. E. 724; *Baker v. Aalberg*, 183 Ill. 258, 55 N. E. 672; *Uedelhofen v. Mason*, 201 Ill. 465, 66 N. E. 364; *Gantzer v. Schmeltz*, 206 Ill. 560, 69 N. E. 584; *Rohrhof v. Schmidt*, 218 Ill. 585, 75 N. E. 1062; *Huber v. Brown*, 243 Ill. 274, 90 N. E. 748.

*Iowa*.—*Mills County Nat. Bank v. Perry*, 72 Ia. 15, 33 N. W. 341, 2 Am. St. Rep. 228.

*Minnesota*.—*Griswold v. Taylor*, 8 Minn. 312.

*Nevada*.—*Cox v. Smith*, 1 Nev. 161, 90 Am. Dec. 476; *McLane v. Abrams*, 2 Nev. 199.

such stipulations have been held to be invalid as opposed to public policy.<sup>10</sup>

What is an unreasonable amount depends on the facts presented in each case; thus fees of two,<sup>11</sup> two and one-half,<sup>12</sup> five,<sup>13</sup> and even ten<sup>14</sup> per cent of the amount of the mortgage have been deemed

*Pennsylvania.*—Warwick Iron Co. v. Morton, 148 Pa. St. 72, 23 Atl. 1065; Walter v. Dickson, 175 Pa. St. 204, 34 Atl. 646.

*South Carolina.*—Bird v. Kendall, 62 S. C. 178, 40 S. E. 142.

*Wisconsin.*—Tallman v. Truesdell, 3 Wis. 443; Boyd v. Sumner, 10 Wis. 41; Rice v. Cribb, 12 Wis. 179; Pierce v. Kneeland, 16 Wis. 672, 84 Am. Dec. 726.

Where attorney's fees for foreclosing mortgages are received by the client, the attorney may maintain an action for them against the client. Union Mut. L. Ins. Co. v. Buchanan, 100 Ind. 63. As to actions for compensation generally, see *infra*, §§ 487–571.

<sup>10</sup> *Arkansas.*—Jarvis v. Southern Grocery Co., 63 Ark. 225, 38 S. W. 148.

*Kentucky.*—Thomasson v. Townsend, 10 Bush 114; Rilling v. Thompson, 12 Bush 310; Kentucky Trust Co. v. Louisville Third Nat. Bank, 106 Ky. 232, 50 S. W. 43; Pryse v. People's Bldg., etc., Assoc., 41 S. W. 574; Southern Warehouse, etc., Co. v. Mechanics' Trust Co., 56 S. W. 162.

*Michigan.*—Sage v. Riggs, 12 Mich. 313; Bullock v. Taylor, 39 Mich. 137, 33 Am. Rep. 356; Vosburgh v. Lay, 45 Mich. 455, 8 N. W. 91; Millard v. Truax, 50 Mich. 343, 15 N. W. 501; Wilkinson v. Baxter, 97 Mich. 536, 56 N. W. 931; Kittermaster v. Brossard, 105 Mich. 219, 63 N. W. 75, 55 Am. St. Rep. 437.

*Ohio.*—State v. Taylor, 10 Ohio 378; Shelton v. Gill, 11 Ohio 417; Spalding v. Muskingum Bank, 12 Ohio 544; Martin v. Belmont Bank, 13 Ohio 250.

*Oregon.*—Balfour v. Davis, 14 Ore. 47, 12 Pac. 89.

<sup>11</sup> McIntire v. Yates, 104 Ill. 491; Simon v. Haidleigh, 21 La. Ann. 607.

<sup>12</sup> Abbott v. Stone, 172 Ill. 634, 50 N. E. 328, 64 Am. St. Rep. 60.

<sup>13</sup> Avery v. Maude, 112 Cal. 565, 44 Pac. 1020; Goodwin v. Bishop, 145 Ill. 421, 34 N. E. 47; Hough v. Wells, 86 Ill. App. 186; Renshaw v. Richards, 30 La. Ann. 398; Levy v. Beasley, 41 La. Ann. 832, 6 So. 630; Grunewald v. Commercial Soap, etc., Manufactory, 49 La. Ann. 489, 21 So. 646; Robson v. Beasley, 118 La. 738, 43 So. 391.

<sup>14</sup> Fechlheimer v. Baum, 43 Fed. 719; Carhart v. Allen, 56 Fla. 763, 48 So. 47; McCall v. Walter, 71 Ga. 287; Thornton v. Commonwealth Loan, etc., Assoc., 181 Ill. 456, 54 N. E. 1037; Barnett v. Davenport, 40 Ill. App. 57; Sharp v. Barker, 11 Kan. 381; Duhé's Succession, 41 La. Ann. 209, 6 So. 502; Hansen v. Creditors, 49 La. Ann. 1731, 22 So. 923; Foster's Succession, 51 La. Ann. 1670, 26 So. 568; Felder v. Leftwich, 123 La. 931, 49 So. 645; Cox v. Smith, 1 Nev. 161, 90 Am. Dec. 476; Armijo v. Henry, 14 N. M. 181, 89 Pac. 305, 25 L.R.A.(N.S.) 275; Cooper v. Indian Territory Bank, 4 Okla. 632, 46 Pac. 475; Branyan v. Kay, 33 S. C. 283, 11

to be within reason. So, the courts have sanctioned lump charges of twenty-five,<sup>15</sup> fifty,<sup>16</sup> seventy-five,<sup>17</sup> one hundred,<sup>18</sup> one hundred and fifty,<sup>19</sup> two hundred,<sup>20</sup> eight hundred,<sup>1</sup> and even one thousand dollars.<sup>2</sup>

The reasonableness of the fees may be determined by the trial court without hearing evidence,<sup>3</sup> and the amount so determined to be reasonable will not be interfered with on review<sup>4</sup> in the absence of manifest error.<sup>5</sup> It is well settled that the court may reduce the fee fixed by the mortgage,<sup>6</sup> but since it is

S. E. 970; *Equitable Bldg., etc., Assoc. v. Hoffman*, 50 S. C. 303, 27 S. E. 692; *Bird v. Kendall*, 62 S. C. 178, 40 S. E. 142; *Columbian Bldg., etc., Assoc. v. Rice*, 68 S. C. 236, 1 Ann. Cas. 239, 47 S. E. 63.

<sup>15</sup> *Eliason v. Sidle*, 61 Minn. 285, 63 N. W. 730; *Hitchcock v. Merriek*, 15 Wis. 522.

<sup>16</sup> *Shaffner v. Healy*, 57 Ill. App. 90.

<sup>17</sup> *Murray v. Chamberlain*, 67 Minn. 12, 69 N. W. 474.

<sup>18</sup> *Barry v. Guild*, 126 Ill. 439, 18 N. E. 759, 2 L.R.A. 334; *Baker v. Aalberg*, 183 Ill. 258, 55 N. E. 672; *Magloughlin v. Clark*, 35 Ill. App. 251; *Guaranty Sav., etc., Assoc. v. Ascherman*, 108 Ia. 150, 78 N. W. 823; *Gibson v. Southwestern Land Co.*, 89 Wis. 49, 61 N. W. 282.

<sup>19</sup> *Buckley v. Jones*, 58 Ill. App. 357.

<sup>20</sup> *Rohrhof v. Schmidt*, 218 Ill. 585, 75 N. E. 1062.

<sup>1</sup> *Commercial Nat. Bank v. Johnson*, 16 Wash. 536, 18 Pac. 267.

<sup>2</sup> *Helfron v. Gage*, 149 Ill. 182, 36 N. E. 569.

<sup>3</sup> *Carriere v. Minturn*, 5 Cal. 435; *Edwards v. Grand*, 121 Cal. 254, 53 Pac. 796; *Hellier v. Russell*, 136 Cal. 143, 68 Pac. 581; *Carhart v. Allen*, 56 Fla. 763, 48 So. 47; *Ames v. Bigelow*, 15 Wash. 532, 46 Pac. 1046;

*Larscheid v. Kittell*, 142 Wis. 172, 20 Ann. Cas. 576, 125 N. W. 442.

<sup>4</sup> *Fowler v. Equitable Trust Co.*, 141 U. S. 411, 12 S. Ct. 8, 35 U. S. (L. ed.) 794; *Ames v. Bigelow*, 15 Wash. 532, 46 Pac. 1046; *Reed v. Catlin*, 49 Wis. 686, 6 N. W. 326.

<sup>5</sup> In *Hawley v. Howell*, 60 Ia. 79, 14 N. W. 199, the mortgage provided that "upon the commencement of foreclosure proceedings, a reasonable attorney fee, not less than fifty dollars, shall become due and payable, and shall be by the court taxed." The plaintiff in his petition for foreclosure claimed an attorney's fee of seventy-five dollars. The defendant did not admit the reasonableness of the claim, but the lower court taxed against him an attorney's fee of seventy-five dollars, without any showing being made that the amount was reasonable. It was held that there was error, and that the lower court should have allowed only the minimum sum which the parties themselves fixed in the mortgage.

<sup>6</sup> *United States*.—*Dodge v. Tulleys*, 144 U. S. 457, 12 S. Ct. 728, 36 U. S. (L. ed.) 501; *Burns v. Scoggin*, 16 Fed. 734.

*Alabama*.—*Munter v. Linn*, 61 Ala. 492.

a matter of contract cannot increase it.<sup>7</sup>

In several jurisdictions the fees which may be charged and collected, and the supervision thereof, in mortgage foreclosure proceedings, are regulated by statute.<sup>8</sup> Thus a California statute provides that in all cases of foreclosure of mortgages the attorney's fee shall be fixed by the court in which the foreclosure proceedings are had, any stipulation in said mortgage to the contrary notwith-

*California*.—Woodland Bank v. Treadwell, 55 Cal. 379.

*Illinois*.—Huber v. Brown, 243 Ill. 274, 90 N. E. 748.

*Indiana*.—Kennedy v. Richardson, 70 Ind. 524.

*Oregon*.—Balfour v. Davis, 14 Ore. 47, 12 Pac. 89.

*Pennsylvania*.—Daly v. Maitland, 88 Pa. St. 384, 32 Am. Rep. 457, overruling Robinson v. Loomis, 51 Pa. St. 78; Lewis v. Germania Sav. Bank, 96 Pa. St. 86; Lindley v. Ross, 137 Pa. St. 629, 20 Atl. 944; Warwick Iron Co. v. Morton, 148 Pa. St. 72, 23 Atl. 1065; Wilson v. Ott, 173 Pa. St. 253, 34 Atl. 23, 51 Am. St. Rep. 767; Cunningham v. McCready, 219 Pa. St. 594, 69 Atl. 82; Scott v. Carl, 24 Pa. Super. Ct. 460; Insurance Co. v. Shields, 12 Phila. 407, 35 Leg. Int. 170; Waln v. Massey, 7 W. N. C. 312; Reed v. Worthington, 9 W. N. C. 192; Weigley v. Charlier, 9 Pa. Dist. Ct. 670.

*South Carolina*.—Matheson v. Rogers, 84 S. C. 458, 19 Ann. Cas. 1066, 65 S. E. 1054, 67 S. E. 476.

*Necessity of Outlay*.—In Reed v. Catlin, 49 Wis. 686, 6 N. W. 326, the court said: "We are strongly inclined to the opinion that if the mortgagee appear in the foreclosure action *in propria persona*, and conduct it himself, without employing a solicitor, nothing should be allowed

under a covenant to pay a specified sum for solicitor's fees."

*Compare* Renshaw v. Richards, 30 La. Ann. 398, wherein it was held that the clause in a mortgage fixing the fees of the creditor's attorney at a certain percentage in the event of the nonpayment of the debt at maturity made the debtor, on the happening of that event, absolutely liable for that amount; and that such liability could not be affected by the fact that the creditor had not really paid or obligated himself to pay that amount of attorney's fees.

<sup>7</sup> *California*.—Worth v. Worth, 155 Cal. 599, 102 Pac. 663.

*Georgia*.—Hamlin v. Rogers, 79 Ga. 581, 5 S. E. 125.

*Illinois*.—Henke v. Gunzenhauser, 195 Ill. 130, 62 N. E. 896.

*Iowa*.—Sawyer v. Perry, 62 Ia. 238, 17 N. W. 497. See also Hawley v. Howell, 60 Ia. 79, 14 N. W. 199.

*Washington*.—Potwin v. Blasher, 9 Wash. 460, 37 Pac. 710.

*Wisconsin*.—Remington v. Willard, 15 Wis. 583; Palmetier v. Carey, 63 Wis. 426, 21 N. W. 793, 23 N. W. 586.

<sup>8</sup> The local laws must be consulted.

In North Carolina, by reason of statute, a stipulation for fixed attorney's fees in a trust deed was declared invalid. Turner v. Boger, 126 N. C. 300, 35 S. E. 592, 49 L.R.A. 590.

standing.<sup>9</sup> A similar law prevails in Utah,<sup>10</sup> and in Washington.<sup>11</sup> The Indiana and Kansas statutes provide, in effect, that any and all agreements to pay attorney's fees, depending upon any condition therein set forth and made part of any bill of exchange, acceptance, draft, promissory note, or other written evidence of indebtedness, are illegal and void.<sup>12</sup>

**§ 446. Stipulation in Note Fixing Attorney Fee for Collection Thereof.**—A stipulation in a note to pay attorney's fees is in the nature of an indemnity contract and, as a general rule, the promisee can recover thereunder only such sums as he has actually and necessarily expended or become liable for on account

<sup>9</sup> Cal. Code Civ. Pro., p. 863. See also *Alden v. Pryal*, 60 Cal. 215; *Monroe v. Fohl*, 72 Cal. 568, 14 Pac. 514; *Moran v. Gardemeyer*, 82 Cal. 96, 23 Pac. 6; *Grangers' Business Assoc. v. Clark*, 84 Cal. 201, 23 Pac. 1081; *Hewitt v. Dean*, 91 Cal. 5, 27 Pac. 423; *Avery v. Maude*, 112 Cal. 565, 44 Pac. 1020; *O'Neal v. Hart*, 116 Cal. 69, 47 Pac. 926; *Mason v. Luce*, 116 Cal. 232, 48 Pac. 72; *Bonestell v. Bowie*, 128 Cal. 511, 61 Pac. 78; *Hotelling v. Monticeth*, 128 Cal. 556, 61 Pac. 95; *Haensel v. Pacific States Sav. etc., Co.*, 135 Cal. 41, 67 Pac. 38; *Hellier v. Russell*, 136 Cal. 143, 68 Pac. 581; *Thrasher v. Moran*, 146 Cal. 683, 81 Pac. 32; *Corson v. McDonald*, 3 Cal. App. 412, 85 Pac. 861.

<sup>10</sup> Utah Comp. Laws (1907) § 3505.

<sup>11</sup> The Washington statute provides: "In all cases of foreclosure of mortgages and in all other cases in which attorney's fees are allowed, the amount thereof shall be fixed by the court at such sum as the court shall deem reasonable, any stipulations in the note, mortgage, or other instrument to the contrary notwithstanding;

but in no case shall said fee be fixed above contract price stated in said note or contract." *Ballinger's Codes & St.* (1897), § 5166. See also *Dennis v. Moses*, 18 Wash. 537, 52 Pac. 333, 40 L.R.A. 302; *Vermont L. & T. Co. v. Greer*, 19 Wash. 611, 53 Pac. 1103.

<sup>12</sup> *Indiana*.—Burns Ann. St. (1908) § 9089. See also *Barry v. Snowden*, 106 Fed. 571.

The Kansas statute provides: "That hereafter it shall be unlawful for any person or persons, company, corporation, or bank, to contract for the payment of attorney's fees in any note, bill of exchange, bond, or mortgage; and any such contract or stipulation for the payment of attorney's fees shall be null and void; and that hereafter no court in this state shall render any judgment, order, or decree by which any attorney's fees shall be allowed or charged to the maker of any promissory note, bill of exchange, bond, mortgage, or other evidence of indebtedness by way of fees, expenses, costs, or otherwise." *Gen. Stat.* (1905) § 4492.



of the default of the promisor,<sup>13</sup> and then only when they are reasonable,<sup>14</sup> and proven to be so,<sup>15</sup> and when the conditions precedent stipulated in the note are shown to exist;<sup>16</sup> but it has been

**13** *Indiana*.—Goss *v.* Bowen, 104 Ind. 207, 2 N. E. 704; Starnes *v.* Schofield, 5 Ind. App. 4, 31 N. E. 480; Moore *v.* Staser, 6 Ind. App. 364, 32 N. E. 563, *affirming* 6 Ind. App. 368, 33 N. E. 665; Judson *v.* Romaine, 8 Ind. App. 390, 35 N. E. 812; Farmers, etc., Nat. Bank *v.* Barton, 21 Ill. App. 403.

*Iowa*.—White *v.* Lucas, 46 Ia. 319.

*Texas*.—Bonnell *v.* Prince, 11 Tex. Civ. App. 399, 32 S. W. 855; Smith *v.* Board, 21 Tex. Civ. App. 213, 51 S. W. 520; Lay *v.* Cardwell, 33 S. W. 595.

*Utah*.—Salisbury *v.* Stewart, 15 Utah 308, 49 Pac. 777, 62 Am. St. Rep. 934.

**14** *Alabama*.—Williams *v.* Flowers, 90 Ala. 136, 7 So. 439, 24 Am. St. Rep. 772; McGhee *v.* Importers' etc., Nat. Bank, 93 Ala. 192, 9 So. 734; Gates *v.* Morton Hardware Co., 146 Ala. 692 mem., 40 So. 509.

*California*.—Hildreth *v.* Williams, 33 Pac. 1113.

*Florida*.—Cooper Grocery Co. *v.* Citizens' Bank & Trust Co., 62 Fla. 142, 56 So. 435.

*Georgia*.—Ray *v.* Pease, 97 Ga. 618, 25 S. E. 360; Morgan *v.* Kiser, 105 Ga. 104, 31 S. E. 45.

*Idaho*.—Rinker *v.* Lauer, 13 Idaho 163, 88 Pac. 1057.

*Indiana*.—Strough *v.* Gear, 48 Ind. 100.

*Minnesota*.—Campbell *v.* Worman, 58 Minn. 561, 60 N. W. 668.

*Missouri*.—Bay *v.* Trusdell, 92 Mo. App. 377.

*Texas*.—Texas Land, etc., Co. *v.* Robertson, 38 Tex. Civ. App. 521, 85 S. W. 1020; Mellhenny *v.* Planters', etc., Nat. Bank, 46 S. W. 282.

*Washington*.—Cloud *v.* Rivord, 6 Wash. 555, 34 Pac. 136; Main *v.* Johnson, 7 Wash. 321, 35 Pac. 67; Warneok *v.* Itawis, 38 Wash. 144, 80 Pac. 297.

*Costs in Appellate Court*.—A stipulation in a note for the payment of attorney's fees does not authorize a recovery of fees necessarily incurred in maintaining the judgment in an appellate court. McCormack *v.* Falls City Bank, 57 Fed. 107, 9 U. S. App. 203, 6 C. C. A. 683.

**15** Orr *v.* Sparkman, 120 Ala. 9, 23 So. 829; Wyant *v.* Pottorff, 37 Ind. 512; Shoup *v.* Snapp, 22 Ind. App. 30, 53 N. E. 189; Museatine First Nat. Bank *v.* Krance, 50 Ia. 235; Bowles *v.* Doble, 11 Ore. 474, 5 Pac. 918; Bradtfeldt *v.* Cooke, 27 Ore. 194, 40 Pac. 1, 50 Am. St. Rep. 701; Cox *v.* Alexander, 30 Ore. 438, 46 Pac. 794; First Nat. Bank *v.* Maek, 35 Ore. 122, 57 Pac. 326.

*Creditor's Attorney Cannot File Amount Due*.—A note with warrant of attorney attached, authorizing any attorney at law to confess judgment for an amount named, and for a reasonable attorney's fee, does not, where the creditor selects his own attorney for that purpose, allow such attorney to fix the amount of attorney's fee which the debtor shall pay. Askew *v.* Goddard, 17 Ill. App. 377.

**16** *In re Jenkins*, 192 Fed. 1000;

held that the court can determine the reasonableness of attorney's fees without hearing evidence.<sup>17</sup>

Where the note itself fixes the amount of the collection fee, the sum so stipulated will control, providing it does not appear to be unreasonable.<sup>18</sup> The reasonableness of the fee must, of course, depend on the facts. In many cases it has been held reasonable to stipulate for ten per cent of the amount of the note as attorney's fees.<sup>19</sup>

In Iowa it is provided by statute that in an action on a written contract providing for attorney's fees, the amount allowed shall be ten per cent on the first two hundred dollars or fractional part thereof, five per cent on the next three hundred dollars, three per cent on the excess of five hundred dollars up to one thousand

*Johnson v. Marsh*, 21 W. N. C. (Pa.) 570.

<sup>17</sup> *Robertson v. Holman*, 36 Tex. Civ. App. 31, 81 S. W. 326; *Dunovant v. Stafford*, 36 Tex. Civ. App. 33, 81 S. W. 101; *Fowler v. Bell*, (Tex.) 35 S. W. 822; *Burns v. Staacke*, (Tex.) 53 S. W. 354.

<sup>18</sup> *Alabama*.—*Wood v. Winship Mach. Co.*, 83 Ala. 424, 3 So. 757, 3 Am. St. Rep. 754; *Stephenson v. Allison*, 123 Ala. 439, 26 So. 290.

*California*.—*Alexander v. McDow*, 108 Cal. 25, 41 Pac. 24.

*Georgia*.—*Cramer v. Huff*, 114 Ga. 981, 41 S. E. 57.

*Missouri*.—*North Atchison Bank v. Gay*, 114 Mo. 203, 21 S. W. 479.

*New Mexico*.—*Exchange Bank v. Tuttle*, 5 N. M. 427, 23 Pac. 241, 7 L.R.A. 445.

*Texas*.—*Eagle Lake First Nat. Bank v. Robinson*, 104 Tex. 166, 135 S. W. 372; *Jungbecker v. Huber*, 101 S. W. 552; *Miller v. Laughlin*, 147 S. W. 711.

*Utah*.—*McCornick v. Swem*, 36 Utah 6, 20 Ann. Cas. 1368, 102 Pac. 626.

*Wisconsin*.—*Stillwater First Nat. Bank v. Larsen*, 60 Wis. 206, 19 N. W. 67, 50 Am. Rep. 365.

<sup>19</sup> *Alabama*.—*Wood v. Winship Mach. Co.*, 83 Ala. 424, 3 So. 757, 3 Am. St. Rep. 754; *Williams v. Flowers*, 90 Ala. 136, 7 So. 439, 24 Am. St. Rep. 772.

*Georgia*.—*Pattillo v. Alexander*, 96 Ga. 60, 22 S. E. 646, 29 L.R.A. 616; *Morgan v. Kiser*, 105 Ga. 104, 31 S. E. 45; *Hamilton v. Rogers*, 126 Ga. 27, 54 S. E. 926; *Kelley v. Farmers', etc., Bank*, 6 Ga. App. 691, 65 S. E. 706.

*Illinois*.—*Dorsey v. Wolff*, 142 Ill. 589, 32 N. W. 495, 34 Am. St. Rep. 99, 18 L.R.A. 428.

*Iowa*.—*McIntire v. Cagley*, 37 Ia. 676.

*Mississippi*.—*Brahan v. First Nat. Bank*, 72 Miss. 266, 16 So. 203.

*Texas*.—*Simmons v. Terrell*, 75 Tex. 275, 12 S. W. 854; *Morrill v. Hoyt*, 83 Tex. 59, 18 S. W. 424, 29 Am. St. Rep. 630; *Huddleston v. Kempner*, 1 Tex. Civ. App. 211, 21 S. W. 946; *Behrens v. Dignowitty*, 4 Tex. Civ. App. 201, 23 S. W. 288;

dollars, and one per cent on all over the latter amount.<sup>20</sup> In Indiana and Kansas stipulations for attorney fees are invalid.<sup>1</sup>

*Under Implied Contract.*

§ 447. **Reasonable Compensation Allowed.**—Implied agreements between attorney and client stand upon the same footing as do like agreements between other parties.<sup>2</sup> They never arise with reference to a subject-matter already covered by a valid subsisting express contract.<sup>3</sup>

The rule in the United States is that where a client avails himself of the professional services of an attorney at law, and accepts the benefits thereof, and the attorney's compensation is not fixed by an express contract, the law will imply a promise on the part of the client to pay the attorney<sup>4</sup> such an

*Carver v. J. S. Mayfield Lumber Co.*, 29 Tex. Civ. App. 434, 68 S. W. 711.

<sup>20</sup> Ia. code (1897) § 3869. See also *Bankers' Iowa State Bank v. Jordan*, 111 Ia. 324, 82 N. W. 779.

<sup>1</sup> *Indiana*.—Burns Ann. St. (1908) § 9089. See also *Barry v. Snowden*, 106 Fed. 571; *Smiley v. Meir*, 47 Ind. 559; *Toler v. Keiher*, 81 Ind. 383; *Rouyer v. Miller*, 16 Ind. App. 519, 44 N. E. 51, 45 N. E. 674.

*Kansas*.—Gen. Stats. (1905) § 4492 (set out in the following text section).

<sup>2</sup> *Stow v. Hamlin*, 11 How. Pr. (N. Y.) 452.

<sup>3</sup> *Lane, etc., Co. v. Taylor*, 80 Ark. 469, 97 S. W. 441, 7 L.R.A.(N.S.) 924; *Bull v. St. Johns*, 39 Ga. 78; *Wilmington v. Bryan*, 141 N. C. 666, 54 S. E. 543.

<sup>4</sup> *United States*.—*Blake v. Elizabeth*, 2 N. J. L. J. 328, 3 Fed. Cas. No. 1,495.

*Georgia*.—*Hood v. Ware*, 34 Ga. 328.

*Illinois*.—*Cooper v. Hamilton*, 52

Ill. 119; *Bell v. Smith*, 28 Ill. App. 181; *Siegel v. Hanchett*, 33 Ill. App. 634.

*Indiana*.—*Miles v. De Wolf*, 8 Ind. App. 176, 34 N. E. 114; *Moore v. Orr*, 10 Ind. App. 89, 37 N. E. 554.

*Iowa*.—*Turner v. Myers*, 23 Ia. 391; *Hudspeth v. Yetzer*, 78 Ia. 11, 42 N. W. 529.

*Kentucky*.—*Pittsburgh, etc., R. Co. v. Woolley*, 12 Bush 451; *Patterson v. Fleenor*, 89 S. W. 705, 28 Ky. L. Rep. 582.

*Louisiana*.—*Carter v. New Orleans*, 5 Rob. 238.

*Massachusetts*.—*Perry v. Lord*, 111 Mass. 504; *Taft v. Shaw*, 159 Mass. 592, 35 N. E. 88; *Paul v. Wilbur*, 189 Mass. 48, 75 N. E. 63.

*Michigan*.—*Cicotte v. Catholic, etc., Church*, 60 Mich. 552, 27 N. W. 682; *Kelley v. Richardson*, 69 Mich. 430, 37 N. W. 514; *Marx v. McMorran*, 136 Mich. 406, 99 N. W. 396, 11 Detroit Leg. N. 80.

*Minnesota*.—*Humphreys v. Jacoby*, 41 Minn. 226, 42 N. W. 1059.

amount as will be equivalent to the reasonable value of the services so rendered by him.<sup>5</sup>

*Missouri*.—Boyd *v.* Chicago, etc., R. Co., 84 Mo. 615; Trimble *v.* Texarkana, etc., R. Co., 199 Mo. 44, 97 S. W. 164.

*New Jersey*.—Scott *v.* New York Filling Co., 79 N. J. L. 231, 75 Atl. 772.

*New York*.—Heller *v.* Kalisch, 141 App. Div. 205, 125 N. Y. S. 1057; Avery *v.* Jacob, 59 Super. Ct. 585 mem., 15 N. Y. S. 564.

*Ohio*.—Holmes *v.* Holland, 11 Ohio Dec. (Reprint) 768, 29 Cine. L. Bul. 115.

*Oklahoma*.—Gillette *v.* Murphy, 7 Okla. 91, 54 Pac. 413; Mellon *v.* Fulton, 22 Okla. 636, 98 Pac. 911, 19 L.R.A.(N.S.) 960.

*South Carolina*.—Ex p. Fort, 36 S. C. 19, 15 S. E. 332.

*Texas*.—Fore *v.* Chandler, 24 Tex. 146.

*Washington*.—Isham *v.* Parker, 3 Wash. 755, 29 Pac. 835; McKay *v.* Atkinson, 55 Wash. 591, 104 Pac. 806.

*West Virginia*.—Watts *v.* West Virginia S. R. Co., 48 W. Va. 262, 37 S. E. 700.

<sup>5</sup> *United States*.—Newman *v.* Keffler, Brun. Col. Cas. 502, 18 Fed. Cas. No. 10,177; Hughes *v.* Dundee Mortg., etc., Co., 21 Fed. 169; Middleton *v.* Bankers, etc., Co., 32 Fed. 524; Tuttle *v.* Claffin, 86 Fed. 964; Central Trust Co. *v.* Ingersoll, 87 Fed. 427, 59 U. S. App. 242, 31 C. C. A. 41; William Firth Co. *v.* Millen Cotton Mills, 129 Fed. 141; Graves *v.* Sanders, 125 Fed. 690, 60 C. C. A. 422, *affirming* 105 Fed. 849; Gilmore *v.* McBride, 156 Fed. 464, 84 C. C. A. 274; Conn *v.* Rice, 204 Fed. 181.

*Alabama*.—Davis *v.* Walker, 131 Ala. 204, 31 So. 554; Irvin *v.* Strother, 163 Ala. 484, 50 So. 969.

*California*.—Roche *v.* Baldwin, 143 Cal. 192, 76 Pac. 956; Cusick *v.* Boyne, 1 Cal. App. 643, 82 Pac. 985.

*Connecticut*.—Rowell *v.* Ross, 87 Conn. 157, 87 Atl. 355.

*Florida*.—Carter *v.* Bennett, 6 Fla. 214; Stewart *v.* Beggs, 56 Fla. 567, 47 So. 932.

*Georgia*.—Churchill *v.* Bee, 66 Ga. 621; Wells *v.* Haynes, 101 Ga. 841, 28 S. E. 968.

*Idaho*.—Mullan *v.* Clark, 4 Idaho 186, 38 Pac. 247.

*Illinois*.—Kirk *v.* Wolf Mfg. Co., 118 Ill. 567, 8 N. E. 815; Louisville, etc., R. Co. *v.* Wallace, 136 Ill. 87, 26 N. E. 493, 11 L.R.A. 787; Nathan *v.* Brand, 167 Ill. 607, 47 N. E. 771, *affirming* 67 Ill. App. 540; McManomy *v.* Chicago, etc., R. Co., 167 Ill. 497, 47 N. E. 712, *reversing* 63 Ill. App. 259; Robinson *v.* Sharp, 201 Ill. 86, 66 N. E. 299, *affirming* 103 Ill. App. 239; Peoples, etc., Co. *v.* Darrow, 70 Ill. App. 22, *affirmed* 172 Ill. 62, 49 N. E. 1005; Bingham *v.* Spruill, 97 Ill. App. 374.

*Indiana*.—U. S. Mortgage Co. *v.* Henderson, 111 Ind. 24, 12 N. E. 88; French *v.* Cunningham, 149 Ind. 632, 49 N. E. 797.

*Iowa*.—Collins *v.* Jennings, 42 Ia. 447; Dorr *v.* Dudley, 135 Ia. 20, 112 N. W. 203; Graham *v.* Dillon, 144 Ia. 82, 121 N. W. 47; Gates *v.* McClenahan, 103 N. W. 969.

*Kentucky*.—Pittsburgh, etc., R. Co. *v.* Woolley, 12 Bush 451; Downing *v.* Major, 2 Dana 228; Fox *v.* Willis,

114 Ky. 940, 72 S. W. 330, 73 S. W. 743; Hays *v.* Johnson, 99 S. W. 332; Fryer *v.* Dicken, 47 S. W. 341, 20 Ky. L. Rep. 696; Dills *v.* Auxier, 85 S. W. 743, 27 Ky. L. Rep. 531; Cochran *v.* Lee, 87 S. W. 769, 27 Ky. L. Rep. 1038.

*Louisiana*.—Billington *v.* Poit-event, etc., Lumber Co., 52 La. Ann. 1397, 27 So. 725; Dinkelspiel *v.* Pons, 119 La. 236, 43 So. 1018.

*Maine*.—Clay *v.* Moulton, 70 Me. 315.

*Maryland*.—Calvert *v.* Coxe, 1 Gill 123.

*Massachusetts*.—Aldrich *v.* Brown, 103 Mass. 527; Taft *v.* Shaw, 159 Mass. 592, 35 N. E. 88; Philbrook *v.* Moxey, 191 Mass. 33, 77 N. E. 520; Blair *v.* Columbian Fireproofing Co., 191 Mass. 333, 77 N. E. 762.

*Michigan*.—Brackett *v.* Sears, 15 Mich. 244; Eggleston *v.* Boardman, 37 Mich. 14; Chamberlain *v.* Rodgers, 79 Mich. 219, 44 N. W. 598.

*Minnesota*.—Selover *v.* Bryant, 54 Minn. 434, 56 N. W. 58, 21 L.R.A. 418, 434; Dwyer *v.* Hurley, 109 Minn. 415, 124 N. W. 4.

*Mississippi*.—Boylan *v.* Holt, 45 Miss. 277; Clifton *v.* Clark, 84 Miss. 795, 37 So. 746.

*Missouri*.—Bogliolo *v.* Scott, 5 Mo. 341; Webb *v.* Browning, 14 Mo. 354; Rose *v.* Spies, 44 Mo. 20; Wright *v.* Baldwin, 51 Mo. 269; Eoff *v.* Irvine, 108 Mo. 378, 18 S. W. 907, 32 Am. St. Rep. 609; Trimble *v.* Texarkana, etc., R. Co., 199 Mo. 44, 97 S. W. 164; Rumsey *v.* Frank, 84 Mo. App. 508; Kingsbury *v.* Joseph, 94 Mo. App. 298, 68 S. W. 93; Dempsey *v.* Wells, 109 Mo. App. 470, 84 S. W. 1015; Bissell *v.* Zorn, 122 Mo. App. 688, 99 S. W. 458.

*New Hampshire*.—Smith *v.* Davis, 45 N. H. 566.

*New Jersey*.—Strong *v.* Mundy, 52 N. J. Eq. 833, 31 Atl. 611, *reversing* 52 N. J. Eq. 744, 30 Atl. 322.

*New York*.—Starin *v.* New York, 106 N. Y. 82, 12 N. E. 643; Randall *v.* Packard, 142 N. Y. 47, 36 N. E. 823; Timney *v.* Pierrepont, 18 App. Div. 627, 45 N. Y. S. 977; Dailey *v.* Devlin, 21 App. Div. 62, 47 N. Y. S. 296; Crosby *v.* Kropf, 33 App. Div. 446, 54 N. Y. S. 76; Hempstead *v.* New York, 86 App. Div. 300, 83 N. Y. S. 806; Sanford *v.* Bronson, 109 App. Div. 835, 96 N. Y. S. 859; Ross *v.* Bayer, etc., Co., 123 App. Div. 404, 107 N. Y. S. 1063; Caccia *v.* Isecke, 123 App. Div. 779, 108 N. Y. S. 542; Steele *v.* Hammond, 136 App. Div. 667, 121 N. Y. S. 589; *In re Raby*, 25 Misc. 240, 55 N. Y. S. 87; Schlesinger *v.* Dunne, 36 Misc. 529, 10 N. Y. Ann. Cas. 350, 73 N. Y. S. 1014; Kellogg *v.* Reese, 48 Hun 621 mem., 14 Civ. Pro. 283, 1 N. Y. S. 291; Van Every *v.* Adams, 42 Super. Ct. 126; Crotty *v.* McKenzie, 42 Super. Ct. 192; Clark *v.* Brooklyn El. R. Co., 42 Hun 635 mem., 5 N. Y. St. Rep. 52; Easton *v.* Smith, 1 E. D. Smith 318; Garr *v.* Mairet, 1 Hilt. 498; Cregier *v.* Cheesbrough, 25 How. Pr. 200; Stevens *v.* Adams, 23 Wend. 57, 26 Wend. 451; Stoutenburgh *v.* Fleer, 87 N. Y. S. 504; Scharps *v.* Hess, 120 N. Y. S. 56.

*North Carolina*.—Simmons *v.* Dav-enport, 140 N. C. 407, 53 S. E. 225.

*Ohio*.—Christy *v.* Douglas, Wright +86.

*Oklahoma*.—Mellon *v.* Fulton, 22 Okla. 636, 98 Pac. 911, 19 L.R.A. (N.S.) 960.

A similar rule prevails in some of the Canadian provinces;<sup>6</sup> in England, however, there can be no such recovery.<sup>7</sup>

But the law does not, in any case, imply a promise by a party against his expressed wishes to the contrary, unless he is under a paramount legal obligation to that effect.<sup>8</sup> So, when an attorney is employed by one who has full knowledge of his rate of charges, without stipulating as to price, it may, perhaps, be fairly inferred that he expected to pay at such rates. But when the client is informed, during the pendency of a suit, of the prices which his attorney is charging for his services, his mere neglect to express

*Pennsylvania*.—Gray v. Brackenridge, 2 P. & W. 75; Foster v. Jack, 4 Watts 334; Newman v. Keffer, 33 Pa. St. 442 note; 18 Fed. Cas. No. 10,177; Lichty v. Hugus, 55 Pa. St. 434; McKelvy's Appeal, 108 Pa. St. 615; Taggart v. Hower, 17 Atl. 13.

*Rhode Island*.—Tiffany v. Morgan, 73 Atl. 465.

*South Carolina*.—Boyd v. Lee, 36 S. C. 19, 15 S. E. 332; Haines v. Wilson, 85 S. C. 338, 67 S. E. 311.

*South Dakota*.—Crammer v. Building & Loan Assoc., 6 S. D. 341, 61 N. W. 35.

*Tennessee*.—Planters Bank v. Hornberger, 4 Coldw. 531, 567; Yerger v. Aiken, 7 Baxt. 539; Newman v. Davenport, 9 Baxt. 544; Moses v. Ocoee Bank, 1 Lea 401; Hume v. Commercial Bank, 13 Lea 496; Grant v. Lookout Mountain Co., 93 Tenn. 691, 28 S. W. 90; Rogers v. O'Mary, 95 Tenn. 514, 32 S. W. 462; Bristol-Goodson Electric Light, etc., Co. v. Bristol Gas, etc., Co., 99 Tenn. 371, 42 S. W. 19; Bowling v. Scales, 1 Tenn. Ch. 618; Butler v. King, 48 S. W. 697; Eakin v. Peoples Hotel Co., 54 S. W. 87; Vinson v. Cantrell, 56 S. W. 1031; Wright v. Knoxville, 59 S. W. 677.

*Texas*.—Fore v. Chandler, 24 Tex.

146; Ector v. Wiggins, 30 Tex. 55; Britt v. Burghart, 16 Tex. Civ. App. 78, 41 S. W. 389; Tindol v. Beasley, 40 S. W. 155; Herndon v. Lammers, 55 S. W. 414; Tennant v. Fawcett, 55 S. W. 611, reversed on other grounds 94 Tex. 111, 58 S. W. 824; Morris v. Kesterson, 88 S. W. 277.

*Vermont*.—Vilas v. Downer, 21 Vt. 419.

*Virginia*.—Yates v. Robertson, 80 Va. 475.

*Washington*.—Schultheis v. Nash, 27 Wash. 250, 67 Pac. 707; McMilan v. Northport Smelting, etc., Co., 49 Wash. 76, 94 Pac. 761; Atwood v. Sicade, 131 Pac. 850.

*West Virginia*.—Watts v. West Virginia, S. R. Co., 48 W. Va. 262, 37 S. E. 700; Dorr v. Camden, 55 W. Va. 226, 46 S. E. 1014, 65 L.R.A. 348; Keenan v. Scott, 64 W. Va. 137, 61 S. E. 806; Cecil v. Clark, 69 W. Va. 641, 72 S. E. 737.

*Wisconsin*.—Vilas v. Bundy, 106 Wis. 168, 81 N. W. 812.

<sup>6</sup> See *supra*, § 403.

<sup>7</sup> See *supra*, § 401.

<sup>8</sup> Hughes v. Dundee Mortg., etc., Co., 21 Fed. 174; Fraser v. Haggerty, 86 Mich. 521, 49 N. W. 616. See also McGraw v. Canton, 74 Md. 554, 22 Atl. 132.

dissatisfaction therewith, or to dismiss the attorney, cannot be held to be an acquiescence in those prices, or as binding him to pay at such rate for future services in the same suit.<sup>9</sup>

In some instances the amount of an attorney's compensation is regulated by statute.<sup>10</sup>

**§ 448. What Are Reasonable Fees.** — It is, of course, well known to the practitioner that no hard and fast rule can be stated which will serve even as a guide in determining what is or what is not a reasonable fee. That must be determined from the facts in each case.<sup>11</sup> An amount which would be reasonable in one case

<sup>9</sup> *Vilas v. Downer*, 21 Vt. 419.

<sup>10</sup> Where the legislature, by a special act, adjusts the claims of attorneys employed by the attorney general in suits in relation to real estate of the state, it withdraws from the courts any jurisdiction on the question of allowance of fees. *Julian v. State*, 122 Ind. 68, 23 N. E. 690.

*Under the British Columbia Workmen's Compensation Act*, § 10, an award limiting an attorney's right in his client's recovery to an allowance to be made by the arbitrator on application, precludes attorneys who sue in British Columbia under that act from claiming any other interest in a recovery. *Plummer v. Great Northern R. Co.*, 60 Wash. 214, 110 Pac. 989, 31 L.R.A.(N.S.) 1215.

*Under Ontario Statute.*—In an action for services rendered as attorneys in the province of Ontario, and claiming compensation in accordance with the rates established by the statutes of Ontario, where defendant contended that there was a special agreement as to the charges to be made, an instruction that, if the jury found no such agreement was made, the plaintiff's compensation would be

regulated by the statute of Ontario, was properly given. *Dawson v. Peterson*, 110 Mich. 431, 68 N. W. 246, 3 Detroit Leg. N. 441.

<sup>11</sup> *United States.*—*Ex p. Plitt*, 2 Wall. Jr. (C. C.) 453, 19 Fed. Cas. No. 11,228; *In re Bignall*, 9 Fed. 385. *Illinois.*—*Bingham v. Spruill*, 97 Ill. App. 374.

*Kentucky.*—*Downing v. Major*, 2 Dana 228; *Fox v. Willis*, 114 Ky. 940, 72 S. W. 330, 24 Ky. L. Rep. 1773, 73 S. W. 743, 24 Ky. L. Rep. 2173.

*Louisiana.*—*Succession of Auld*, 45 La. Ann. 248, 11 So. 948.

*Maryland.*—*Gordon v. Miller*, 14 Md. 204.

*Michigan.*—*Brackett v. Sears*, 15 Mich. 244; *Warren v. Sheehan*, 156 Mich. 432, 120 N. W. 810, 16 Detroit Leg. N. 157.

*Nebraska.*—*Cressman v. Whitall*, 16 Neb. 592, 21 N. W. 458.

*New York.*—*Farmers' L. & T. Co. v. Mann*, 4 Robt. 356; *Randall v. Kingsland*, 53 How. Pr. 512.

*Rhode Island.*—*Burns v. Allen*, 15 R. I. 32, 23 Atl. 35, 2 Am. St. Rep. 844.

*South Carolina.*—*Duncan v. Breithaupt*, 1 McCord L. 149.

might be grossly excessive in another. Thus, merely by way of illustration, fees have been sustained as reasonable to the extent of twenty,<sup>12</sup> twenty-five,<sup>13</sup> fifty,<sup>14</sup> sixty,<sup>15</sup> one hundred and fifty,<sup>16</sup> two hundred,<sup>17</sup> two hundred and fifty,<sup>18</sup> three hundred,<sup>19</sup> four hundred,<sup>20</sup> four hundred and fifty,<sup>1</sup> four hundred and seventy-five,<sup>2</sup> five hundred,<sup>3</sup> six hundred,<sup>4</sup> seven hundred,<sup>5</sup> eight hundred,<sup>6</sup> one thousand,<sup>7</sup> thirteen hundred,<sup>8</sup> two thousand,<sup>9</sup> twenty-eight hundred,<sup>10</sup> three thousand,<sup>11</sup> five thousand,<sup>12</sup> six thousand,<sup>13</sup> ten

<sup>12</sup> McLaren *v.* Lochrane, 51 Ga. 237.

<sup>13</sup> Farley *v.* Geishaker, 78 Ia. 453, 43 N. W. 279, 6 L.R.A. 533; Hitchcock *v.* Merriek, 15 Wis. 522.

<sup>14</sup> Johnson *v.* Ravitch, 113 App. Div. 810, 921, 99 N. Y. S. 1059, 100 N. Y. S. 1123; Aultman & Taylor Co. *v.* Gilbert, 28 S. C. 303, 5 S. E. 806.

<sup>15</sup> Reisterer *v.* Carpenter, 124 Ind. 30, 24 N. E. 371.

<sup>16</sup> Lartigue *v.* White, 25 La. Ann. 325; Kult *v.* Nelson, 24 Misc. 20, 53 N. Y. S. 95, modified 25 Misc. 238, 55 N. Y. S. 56; Mumma's Appeal, 127 Pa. St. 474, 18 Atl. 6, 24 W. N. C. 297.

<sup>17</sup> Uzee *v.* Biron, 6 La. Ann. 565; Billington *v.* Poitevent, etc., Lumber Co., 52 La. Ann. 1397, 27 So. 725; Koenig *v.* Harned, (N. J.) 13 Atl. 236; Farmers' L. & T. Co. *v.* Mann, 4 Robt. (N. Y.) 356; Taylor *v.* Badoux, (Tenn.) 58 S. W. 919.

<sup>18</sup> Callender *v.* Turpin, (Tenn.) 61 S. W. 1057.

<sup>19</sup> In re Pieris, 82 App. Div. 466, 81 N. Y. S. 927, affirmed 176 N. Y. 566, 68 N. E. 1123.

<sup>20</sup> Patterson *v.* Fleenor, 89 S. W. 705, 28 Ky. L. Rep. 582; In re Leech, 45 La. Ann. 194, 12 So. 126.

<sup>1</sup> Fryer *v.* Dicken, 47 S. W. 341, 20 Ky. L. Rep. 696.

<sup>2</sup> Wilson *v.* Minneapolis, etc., R. Co., 31 Minn. 181, 18 N. W. 291.

<sup>3</sup> Copley *v.* Harrison, 3 Rob. (La.)

83; Succession of Sterry, 38 La. Ann. 854; Vinson *v.* Cantrell, (Tenn.) 56 S. W. 1034; Halaska *v.* Cotzhausen, 52 Wis. 624, 9 N. W. 401.

<sup>4</sup> Garrigus *v.* Gilbert, 4 Ky. L. Rep. 1001 (abstract).

<sup>5</sup> Succession of Roth, 33 La. Ann. 540; In re Culp, 26 W. N. C. (Pa.) 78.

<sup>6</sup> Eakin *v.* Peeples Hotel Co., (Tenn.) 54 S. W. 87.

<sup>7</sup> Davis *v.* Webber, 66 Ark. 190, 49 S. W. 822, 74 Am. St. Rep. 81, 45 L.R.A. 196; Wright *v.* Knoxville Livery, etc., Co., (Tenn.) 59 S. W. 677; McMillan *v.* Northport Smelting, etc., Co., 49 Wash. 76, 94 Pac. 761.

<sup>8</sup> Young *v.* Lanznar, 133 Mo. App. 130, 112 S. W. 17.

<sup>9</sup> Hempstead *v.* New York, 86 App. Div. 300, 83 N. Y. S. 806; Butler *v.* King, (Tenn.) 48 S. W. 697.

<sup>10</sup> National Home Bldg., etc., Assoc. *v.* Fifer, 71 Ill. App. 295.

<sup>11</sup> Stucky *v.* Smith, 148 Ky. 401, 146 S. W. 1128; Morehead *v.* Anderson, 100 S. W. 340, 30 Ky. L. Rep. 1137; Gribble *v.* Ford, (Tenn.) 52 S. W. 1007.

<sup>12</sup> In re Treadwell, 23 Fed. 442, 9 Sawy. 29; St. Louis, etc., R. Co. *v.* Clark, 51 Fed. 483, 10 U. S. App. 66, 2 C. C. A. 331; Sanders *v.* Seelye, 128 Ill. 631, 21 N. E. 601.

<sup>13</sup> Ex p. Plitt, 2 Wall. Jr. (C. C.) 453, 19 Fed. Cas. No. 11,228; Cellu-



thousand,<sup>14</sup> twelve thousand,<sup>15</sup> thirteen thousand,<sup>16</sup> twenty-one thousand,<sup>17</sup> twenty-seven thousand dollars,<sup>18</sup> and upwards.<sup>19</sup>

On the other hand, charges have been denounced as excessive where, from the facts presented, they appeared to be unreasonable;<sup>20</sup> thus as to charges of one hundred,<sup>1</sup> two hundred and twenty-five,<sup>2</sup> two hundred and fifty,<sup>3</sup> three hundred,<sup>4</sup> five hundred,<sup>5</sup> eight hundred,<sup>6</sup> nine hundred and seventy-five,<sup>7</sup> and twenty-five hundred dollars.<sup>8</sup>

Where there are several suits all of the same character, the determination of one of which will determine all the others, counsel cannot recover the same for each suit as if each had been litigated separately, but must be limited to a reasonable compensation for the case tried, and to a nominal one for the others. So, where there are several arguments of a case on appeal, which are mere restatements of the same proposition, they should not be treated as services rendered in separate cases, in determining the amount of the attorney's compensation.<sup>9</sup> Nor can a just estimate of the

loid Mfg. Co. *v.* Chandler, 27 Fed. 9;  
Lamar Ins. Co. *v.* Pennell, 19 Ill. App.  
212.

<sup>14</sup> Delahunty *v.* Canfield, 118 App.  
Div. 883, 103 N. Y. S. 939; Thompson  
*v.* Knickerbocker Ice Co., 6 N. Y. S. 7,  
*affirmed* 127 N. Y. 671, 28 N. E. 255.

<sup>15</sup> Hays *v.* Johnson, 99 S. W. 332,  
30 Ky. L. Rep. 614.

<sup>16</sup> Tuttle *v.* Claffin, 86 Fed. 964;  
Louisville Gas Co. *v.* Hargis, (Ky.)  
33 S. W. 946.

<sup>17</sup> People *v.* Bond St. Sav. Bank, 10  
Abb. N. Cas. (N. Y.) 15.

<sup>18</sup> Atlantic Sav. Bank *v.* Hetterick.  
5 Thomp. & C. (N. Y.) 239.

<sup>19</sup> Frink *v.* McComb, 60 Fed. 486.

<sup>20</sup> *New York*.—Frost *v.* Frost, 1  
Barb. Ch. 492; Kellogg *v.* Potter, 11  
Wend. 170; Jordans *v.* Van Hoesen,  
18 Wend. 648; Starin *v.* New York,  
106 N. Y. 82, 12 N. E. 643; Ackerman  
*v.* Wagener, 55 Hun 608 mem., 8 N.  
Y. S. 457; In re Raby, 25 Misc. 240,  
55 N. Y. S. 87.

*Texas*.—Ker *v.* Paschal, 1 Tex. Un-  
rep. Cas. 692.

*Wisconsin*.—Yates *v.* Shepardson,  
27 Wis. 238; Rogers *v.* Priest, 74  
Wis. 538, 43 N. W. 510.

<sup>1</sup> Combs *v.* Combs, 82 S. W. 298, 26  
Ky. L. Rep. 617.

<sup>2</sup> Frost *v.* Reinach, 40 Misc. 412, 81  
N. Y. S. 246.

<sup>3</sup> Thomasson *v.* Latourette, 63 App.  
Div. 408, 71 N. Y. S. 559.

<sup>4</sup> Gordon *v.* Miller, 14 Md. 214.

<sup>5</sup> Dorsey *v.* Corn, 2 Ill. App. 533;  
Scharps *v.* Hess, 120 N. Y. S. 56.

<sup>6</sup> In re Ludeke, 22 Misc. 676, 50  
N. Y. S. 962.

<sup>7</sup> In re Raby, 25 Misc. 240, 55 N. Y.  
S. 87.

<sup>8</sup> In re Rude, 101 Fed. 805.

<sup>9</sup> Brackett *v.* Sears, 15 Mich. 244.  
See also Greeff *v.* Miller, 87 Fed. 33;  
In re Kellogg, 96 App. Div. 608, 88  
N. Y. S. 1033, *affirmed* 180 N. Y. 534,  
72 N. E. 1144.

value of an attorney's services, while engaged in the settlement of one particular account, be obtained by splitting up the claim into several items, even though he had numerous consultations with the client in regard to the matter.<sup>10</sup>

**§ 449. Matters Considered in Determining Reasonable Value of Services.** — The elements which may properly be considered in determining the reasonable value of the services of an attorney at law are many and varied, and, to a large extent, dependent on the facts presented by each case, and the environment of the parties.<sup>11</sup> It may be said generally that it is customary to consider: (1) the ability, standing, skill, and experience of the attorney;<sup>12</sup> (2) his reputation as a specialist in the particular

<sup>10</sup> *Randall v. Kingsland*, 53 How. Pr. (N. Y.) 512.

Where an attorney performs distinct services for a party without any general employment, there is some reason for saying that for each of these detached services he should charge a separate price, and, in case of dispute, prove its separate value; but any such practice in regard to a general employment would be unreasonable and impracticable. *Kelley v. Richardson*, 69 Mich. 430, 37 N. W. 514.

<sup>11</sup> *Steele v. Hammond*, 136 App. Div. 667, 121 N. Y. S. 589.

<sup>12</sup> *Colorado*.—*Willard v. Williams*, 10 Colo. App. 140, 50 Pac. 207.

*Iowa*.—*Clark v. Ellsworth*, 104 Ia. 442, 73 N. W. 1023; *Graham v. Dubuque Specialty Mach. Works*, 138 Ia. 456, 114 N. W. 619, 15 L.R.A. (N.S.) 729.

*Kentucky*.—*Garrigus v. Gilbert*, 4 Ky. L. Rep. 1001 (abstract).

*Louisiana*.—*Fenner v. McCau*, 49 La. Ann. 600, 21 So. 768.

*Massachusetts*.—*Blair v. Columbian Fireproofing Co.*, 191 Mass. 333, 77 N. E. 762.

*Michigan*.—*Eggleston v. Beardman*, 37 Mich. 14; *Lungerhausen v. Crittenden*, 103 Mich. 173, 61 N. W. 270.

*New York*.—*People v. Delaware County*, 45 N. Y. 202; *Randall v. Packard*, 142 N. Y. 47, 36 N. E. 823; *Steele v. Hammond*, 136 App. Div. 667, 121 N. Y. S. 589; *Schlesinger v. Dunne*, 36 Misc. 529, 10 N. Y. Ann. Cas. 350, 73 N. Y. S. 1014.

*Ohio*.—*Kittredge v. Armstrong*, 11 Ohio Dec. (Reprint) 661, 28 Cinc. L. Bul. 249.

*Oregon*.—*Hamilton v. Holmes*, 48 Ore. 453, 87 Pac. 154.

*Pennsylvania*.—*In re McLean*, 5 Kulp 170.

*Rhode Island*.—*Gorman v. Bani-gan*, 22 R. I. 22, 46 Atl. 38.

*Tennessee*.—*Butler v. King*, 48 S. W. 697.

*Vermont*.—*Vilas v. Downer*, 21 Vt. 419.

*West Virginia*.—*Dorr v. Camden*, 55 W. Va. 226, 46 S. E. 1014, 65 L.R.A. 348.

"In estimating the value of professional services, there is a personal element which neither the applicant,

line of professional business in which he was retained:<sup>13</sup> (3) the necessity<sup>14</sup> and demand<sup>15</sup> for his services: (4) the nature and character of the controversy, the questions involved therein,<sup>16</sup>

the court, nor his brother lawyers who may be called on as witnesses can or ought to ignore. The same services rendered by a young lawyer with the ink on his license scarcely dry, and by a veteran of forty years' experience, who may have occupied high judicial positions, will, properly enough, be measured by each by a very different standard, and will entitle each to very different compensation." *Bowling v. Scales*, 1 Tenn. Ch. 620. *Eakin v. Peebles Hotel Co.*, (Tenn.) 54 S. W. 87.

<sup>13</sup> *Schlesinger v. Dunne*, 36 Misc. 529, 10 N. Y. Ann. Cas. 350, 73 N. Y. S. 1014.

<sup>14</sup> *Artz v. Robertson*, 50 Ill. App. 27.

<sup>15</sup> *Blair v. Columbian Fireproofing Co.*, 191 Mass. 333, 77 N. E. 762.

<sup>16</sup> *Colorado*.—*Willard v. Williams*, 10 Colo. App. 140, 50 Pac. 207.

*Connecticut*.—*Phelps v. Hunt*, 40 Conn. 97.

*Illinois*.—*Campbell v. Goddard*, 17 Ill. App. 385.

*Kansas*.—*Ottawa University v. Parkinson*, 14 Kan. 159.

*Kentucky*.—*Louisville Gas Co. v. Hargis*, 33 S. W. 946; *Garrigus v. Gilbert*, 4 Ky. L. Rep. 1001 (abstract).

*Louisiana*.—*Fenner v. McCan*, 49 La. Ann. 600, 21 So. 768.

*Massachusetts*.—*Caverly v. McOwen*, 123 Mass. 574; *Blair v. Columbian Fireproofing Co.*, 191 Mass. 333, 77 N. E. 762.

*Michigan*.—*Eggleson v. Boardman*, 37 Mich. 14; *Chamberlain v. Rodgers*, 79 Mich. 219, 44 N. W. 598.

*Minnesota*.—*Sclover v. Bryant*, 54 Minn. 434, 56 N. W. 58, 40 Am. St. Rep. 349, 21 L.R.A. 418.

*Mississippi*.—*Holly Springs v. Manning*, 55 Miss. 380.

*Nevada*.—*Quint v. Ophir Silver Min. Co.*, 4 Nev. 304.

*New York*.—*Walker v. American Nat. Bank*, 49 N. Y. 659; *Harland v. Lilienthal*, 53 N. Y. 438; *Schlesinger v. Dunne*, 36 Misc. 529, 10 N. Y. Ann. Cas. 350, 73 N. Y. S. 1014; *People v. Bond St. Sav. Bank*, 10 Abb. N. Cas. 15.

*Ohio*.—*Kittredge v. Armstrong*, 11 Ohio Dec. (Reprint) 661, 28 Cinc. L. Bul. 249.

*Rhode Island*.—*Gorman v. Banigan*, 22 R. I. 22, 46 Atl. 38.

*Tennessee*.—*Butler v. King*, 48 S. W. 697.

*Texas*.—*International, etc., R. Co. v. Clark*, 81 Tex. 51, 16 S. W. 631.

*Virginia*.—*Parsons v. Maury*, 101 Va. 516, 44 S. E. 758.

In *Forsyth v. Doolittle*, 120 U. S. 73, 7 S. Ct. 408, 30 U. S. (L. ed.) 586, Mr. Justice Field said: "The services for which compensation is sought were not only those required of attorneys and counselors at law, but were also those of negotiators seeking to accomplish the result desired, by consultation with proposed purchasers, and presentation to them of the advantages to be derived from the property, present and prospective. Varied as were the legal services of the plaintiffs, it is plain from the testimony that those rendered by negotiation and consultation, and presentation of the uses to

and the importance of the litigation:<sup>17</sup> (5) the responsibility assumed:<sup>18</sup> (6) the time<sup>19</sup> and labor expended,<sup>20</sup> and the benefits

which the property could be applied, were far more effective and important. This fact necessarily had a controlling weight in estimating the value of the services. It is difficult to apply to such services any fixed standard by which they can be measured, and their value determined, as can be done with reference to services purely professional. There is a tact and skill and a happy manner with some persons, which render them successful as negotiators, while others, of equal learning, attainments, and intellectual ability, fail for the want of those qualities. The compensation to be made in such cases is, by the ordinary judgment of business men, measured by the results obtained. It is not limited by the time occupied or the labor bestowed." *Quoted in Graves v. Sanders*, 125 Fed. 690, 60 C. C. A. 422, *affirming* 105 Fed. 849.

<sup>17</sup> *Iowa*.—*Graham v. Dubuque Specialty Mach. Works*, 138 Ia. 456, 114 N. W. 619, 15 L.R.A.(N.S.) 729.

*Louisiana*.—*Fenner v. McCan*, 49 La. Ann. 600, 21 So. 768.

*Massachusetts*.—*Blair v. Columbian Fireproofing Co.*, 191 Mass. 333, 77 N. E. 762.

*New York*.—*Randall v. Packard*, 142 N. Y. 47, 36 N. E. 823; *Tinney v. Pierrepont*, 18 App. Div. 627, 45 N. Y. S. 977; *Steele v. Hammond*, 136 App. Div. 667, 121 N. Y. S. 589; *Schlesinger v. Dunne*, 36 Misc. 529, 10 N. Y. Ann. Cas. 350, 73 N. Y. S. 1014.

*Pennsylvania*.—*Heblieh v. Slater*, 217 Pa. St. 401, 66 Atl. 655.

Where an attorney is called into

important unfinished litigation, to succeed distinguished counsel who have failed to satisfy the client, it cannot be said the matters were trivial, and not worthy of compensation. *Niemann v. Collyer*, 71 Hun 612 mem., 24 N. Y. S. 516.

<sup>18</sup> *Fenner v. McCan*, 49 La. Ann. 600, 21 So. 768; *Butler v. King*, (Tenn.) 48 S. W. 697.

<sup>19</sup> *Iowa*.—*Farley v. Geisheker*, 78 Ia. 453, 43 N. W. 279, 6 L.R.A. 533; *Graham v. Dubuque Specialty Mach. Works*, 138 Ia. 456, 114 N. W. 619, 15 L.R.A.(N.S.) 729.

*Kansas*.—*Cooper v. Harvey*, 77 Kan. 854, 94 Pac. 213.

*Louisiana*.—*Macarty's Succession*, 3 La. Ann. 518; *Lee's Succession*, 4 La. Ann. 578; *Breaux v. Francke*, 30 La. Ann. 336.

*Michigan*.—*Crowell v. Truax*, 94 Mich. 585, 54 N. W. 384.

*Missouri*.—*Trimble v. Kansas City, etc., R. Co.*, 201 Mo. 372, 100 S. W. 7.

*Nevada*.—*Quint v. Ophir Silver Min. Co.*, 4 Nev. 304.

*New Jersey*.—*Koenig v. Harned*, 13 Atl. 236.

*New York*.—*Schlesinger v. Dunne*, 36 Misc. 529, 10 N. Y. Ann. Cas. 350, 73 N. Y. S. 1014.

*Pennsylvania*.—*In re Becher*, 19 Phila. 29, 45 Leg. Int. 94.

*Texas*.—*International & G. N. R. Co. v. Clark*, 81 Tex. 48, 16 S. W. 631.

<sup>20</sup> *Kentucky*.—*Hays v. Johnson*, 99 S. W. 332.

*Louisiana*.—*Fenner v. McCan*, 49 La. Ann. 600, 21 So. 768.

*Michigan*.—*Eggleston v. Boardman*,

derived therefrom:<sup>1</sup> (7) the amount involved:<sup>2</sup> (8) the result:<sup>3</sup>

37 Mich. 17; *Kelley v. Richardson*, 69 Mich. 430, 37 N. W. 514; *Chamberlain v. Rodgers*, 79 Mich. 219, 44 N. W. 598.

*New York*.—*People v. Delaware County*, 45 N. Y. 202; *Randall v. Packard*, 142 N. Y. 47, 36 N. E. 823; *In re Kellogg*, 96 App. Div. 608, 88 N. Y. S. 1033, *affirmed* 180 N. Y. 534, 72 N. E. 1144; *Steele v. Hammond*, 136 App. Div. 667, 121 N. Y. S. 589.

*Rhode Island*.—*Gorman v. Banigan*, 22 R. I. 22, 46 Atl. 38.

"It is very evident that the responsibility, the care, anxiety, and mental labor, is much greater in a case where the amount in controversy is large than where it is insignificant, although, perhaps, the same questions might be raised in each case, or the more difficult questions arise in the case where the amount was of but slight consequence. Nor is this responsibility, care, and mental labor dependent alone upon the number of hours or days which may be given to the preparation and trial or argument of a case. This responsibility and mental anxiety is not so imaginative and shadowy that it should not be considered in arriving at a proper compensation to be allowed in fixing the value of the services rendered." *Eggleston v. Boardman*, 37 Mich. 17. See also *Chamberlain v. Rodgers*, 79 Mich. 219, 44 N. W. 598.

<sup>1</sup> *Haish v. Payson*, 107 Ill. 365; *Garrigus v. Gilbert*, 4 Ky. L. Rep. 1001 (abstract); *Randall v. Packard*, 142 N. Y. 47, 36 N. E. 823; *Howard v. Charleston First Nat. Bank*, (Va.) 27 S. E. 492.

<sup>2</sup> *United States*.—*Lombard v. Bayard*, 1 Wall. Jr. (C. C.) 196, 15 Fed. Cas. No. 8,469; *Ward v. Kohn*, 58 Fed. 462, 19 U. S. App. 280, 7 C. C. A. 314; *Graves v. Sanders*, 125 Fed. 690, 60 C. C. A. 422, *affirming* 105 Fed. 849; *Gilmore v. McBride*, 156 Fed. 464, 84 C. C. A. 274.

*California*.—*Cusick v. Boyne*, 1 Cal. App. 643, 82 Pac. 985.

*Illinois*.—*McMannomy v. Chicago, etc., R. Co.*, 167 Ill. 497, 47 N. E. 712, *reversing* 63 Ill. App. 259.

*Iowa*.—*Smith v. Chicago, etc., R. Co.*, 60 Ia. 515, 15 N. W. 291; *Graham v. Dubuque Specialty Mach. Works*, 138 Ia. 456, 114 N. W. 619, 15 L.R.A.(N.S.) 729.

*Kansas*.—*Ottawa University v. Parkinson*, 14 Kan. 159.

*Kentucky*.—*Morehead v. Anderson*, 125 Ky. 77, 100 S. W. 340.

*Louisiana*.—*Copley v. Harrison*, 3 Rob. 83; *Succession of Virgin*, 18 La. Ann. 42; *Breaux v. Francke*, 30 La. Ann. 336; *Fenner v. McCan*, 49 La. Ann. 600, 21 So. 768.

*Michigan*.—*Eggleston v. Boardman*, 37 Mich. 14.

*Mississippi*.—*Holly Springs v. Manning*, 55 Miss. 380.

*Nevada*.—*Quint v. Ophir Silver Min. Co.*, 4 Nev. 304.

*New York*.—*Garfield v. Kirk*, 65 Barb. 464; *People v. Bond St. Sav. Bank*, 10 Abb. N. Cas. 15.

*Pennsylvania*.—*Kentucky Bank v. Combs*, 7 Pa. St. 543.

*Tennessee*.—*Butler v. King*, 48 S. W. 697.

<sup>3</sup> *Colorado*.—*Fillmore v. Wells*, 10 Colo. 228, 15 Pac. 343, 3 Am. St. Rep. 567.

and (9) any other circumstance attending the cause which, according to established usage, will serve as a guide in determining what is a proper charge.<sup>4</sup>

So, in some instances, it has been deemed proper to consider the customary fees charged by other lawyers in the same jurisdiction for similar services;<sup>5</sup> to take into consideration the client's

*Florida*.—*Stewart v. Beggs*, 56 Fla. 565, 47 So. 932.

*Iowa*.—*Stevens v. Ellsworth*, 95 Ia. 231, 63 N. W. 683; *Graham v. Dubuque Specialty Mach. Work*, 138 Ia. 456, 114 N. W. 619, 15 L.R.A. (N.S.) 729.

*Kentucky*.—*Louisville Gas Co. v. Hargis*, 33 S. W. 946; *Germania Safety Vault & Trust Co.'s Assignee v. Hargis*, 64 S. W. 516, 23 Ky. L. Rep. 874; *Bowser v. Patrick*, 65 S. W. 824, 23 Ky. L. Rep. 1578.

*Louisiana*.—*Rutland v. Cobb*, 32 La. Ann. 857.

*Michigan*.—*Eggleston v. Boardman*, 37 Mich. 14.

*Minnesota*.—*Selover v. Bryant*, 54 Minn. 434, 56 N. W. 58, 40 Am. St. Rep. 349, 21 L.R.A. 418.

*Missouri*.—*Trimble v. Kansas City, etc., R. Co.*, 201 Mo. 372, 100 S. W. 7.

*New York*.—*Randall v. Packard*, 142 N. Y. 47, 36 N. E. 823, *affirming* 1 Misc. 344, 20 N. Y. S. 716; *Hempstead v. New York*, 86 App. Div. 300, 83 N. Y. S. 806; *Steele v. Hammond*, 136 App. Div. 667, 121 N. Y. S. 589; *Schlesinger v. Dunne*, 36 Misc. 529, 10 N. Y. Ann. Cas. 350, 73 N. Y. S. 1014.

*Oregon*.—*Hamilton v. Holmes*, 48 Ore. 453, 87 Pac. 154.

*Pennsylvania*.—*Heblich v. Slater*, 217 Pa. St. 404, 66 Atl. 655.

*Rhode Island*.—*Gorman v. Banigan*, 22 R. I. 22, 46 Atl. 38.

*Tennessee*.—*Butler v. King*, 48 S. W. 697.

<sup>4</sup> *Holly Springs v. Manning*, 55 Miss. 380.

<sup>5</sup> *Illinois*.—*Louisville, etc., R. Co. v. Wallace*, 136 Ill. 87, 26 N. E. 493, 11 L.R.A. 787; *Nathan v. Brand*, 167 Ill. 607, 47 N. E. 771, *affirming* 67 Ill. App. 540; *Bingham v. Spruill*, 97 Ill. App. 374.

*Iowa*.—*Clark v. Ellsworth*, 104 Ia. 442, 73 N. W. 1023.

*Michigan*.—*Eggleston v. Boardman*, 37 Mich. 14.

*Rhode Island*.—*Gorman v. Banigan*, 22 R. I. 22, 46 Atl. 38.

In *Eggleston v. Boardman*, 37 Mich. 14, it was said that the amount charged by an attorney in a certain case cannot fairly be considered as evidence competent to fix the value of the services rendered by the attorney for the other parties in the same case. The amount paid in a particular case cannot be considered or accepted as the proper amount in all like cases. It is not like the sale of certain commodities, where the price at which an article sold may have a tendency to fix or show the market price. There may be peculiar circumstances or elements which assisted in fixing the amount paid in one case, which would not exist in another, or even between counsel of equal standing in the same case, both in the character of the work, and in the amount and

wealth,<sup>6</sup> and whether or not the agreement for compensation was contingent on success;<sup>7</sup> and to include a reasonable retaining fee.<sup>8</sup>

But, as regulations adopted by members of the bar can operate only as between those who assent to them, a client is not necessarily bound to pay for the services of an attorney or counsel according to rates which may have been prescribed therefor by an association of the bar, in the absence of a special agreement to that effect, or of proof that the client employed the attorney with knowledge of, and implied assent to, the bar rules.<sup>9</sup> Nor are attorneys limited to the amount which the state pays its officials for like services.<sup>10</sup> Nor is it material what the adverse party might have paid the attorney if he had been retained by them.<sup>11</sup>

kind of preparation required. The question is what were plaintiff's services reasonably worth, and this must be determined from the prices usually charged for similar services.

<sup>6</sup> *United States*.—*Lombard v. Bayard*, 1 Wall. Jr. (C. C.) 196, 15 Fed. Cas. No. 8,469; *Ward v. Kohn*, 58 Fed. 462, 19 U. S. App. 280, 7 C. C. A. 314.

*Louisiana*.—*Breaux v. Francke*, 30 La. Ann. 336.

*New York*.—*Randall v. Packard*, 142 N. Y. 47, 36 N. E. 823.

*Texas*.—*International, etc., R. Co. v. Clark*, 81 Tex. 48, 16 S. W. 631.

*Compare* *Stevens v. Ellsworth*, 95 Ia. 321, 63 N. W. 683, wherein it was said: "We think no court has ever said that, with the facts the same, a reasonable compensation for a professional service for a poor man is worth less than the same service for a rich man. It is likely true that less is often taken from the poor than from the rich, but the reason is not because of a difference in what the service is reasonably worth, but because of a disposition of professional persons to charge less in such cases, even to the extent, in some cases, of making it a gratuity,

or a mere trifle. The practice is to be commended, but not under a rule that they may, while thus giving to one, take, because of that fact, from another. If it is the rule that fees may be enhanced because of the wealth of the client, we do not see why, in a case where the client is poor, that fact may not be shown to lessen the compensation, and such a rule has never obtained."

<sup>7</sup> *Frink v. McComb*, 60 Fed. 486; *Smith v. Couch*, 117 Mo. App. 267, 92 S. W. 1143; *Hamilton v. Holmes*, 48 Ore. 453, 87 Pac. 154; *Mumma's Appeal*, 127 Pa. St. 474, 18 Atl. 6. See also *Morehouse v. Brooklyn Heights R. Co.*, 123 App. Div. 680, 108 N. Y. S. 152; *Steele v. Hammond*, 136 App. Div. 667, 121 N. Y. S. 589. *Compare* *O'Neill v. Crane*, 65 App. Div. 358, 72 N. Y. S. 812.

<sup>8</sup> *Roche v. Baldwin*, 143 Cal. 186, 76 Pac. 956; *Mellon v. Fulton*, 22 Okla. 636, 98 Pac. 911, 19 L.R.A. (N.S.) 960.

<sup>9</sup> *Boylan v. Holt*, 45 Miss. 277.

<sup>10</sup> *Hyde v. Moxie Nerve-Food Co.*, 160 Mass. 559, 36 N. E. 585.

<sup>11</sup> *Steenerson v. Waterbury*, 52 Minn. 211, 53 N. W. 1146.

*On Premature Termination of Employment Generally.*

§ 450. **Performance Prevented by Client.** — The right of the client to discharge his attorney at will, subject only to the obligation to pay him a fair compensation for his services, is beyond question.<sup>12</sup> The attorney may recover the reasonable value of his services on a *quantum meruit* where he has been discharged without cause,<sup>13</sup> or where the client, in any other manner, wrongfully prevents the performance of the duties undertaken by the attorney.<sup>14</sup>

<sup>12</sup> See *supra*, §§ 137, 138.

<sup>13</sup> *Arkansas*.—Weil *v.* Finneran, 70 Ark. 509, 69 S. W. 310.

*Illinois*.—Union Surety & Guaranty Co. *v.* Tenney, 102 Ill. App. 95, affirmed 200 Ill. 349, 65 N. E. 688.

*Indiana*.—Scobey *v.* Ross, 5 Ind. 445.

*Kentucky*.—Henry *v.* Vance, 111 Ky. 72, 63 S. W. 273; Bowser *v.* Patrick, 65 S. W. 824, 23 Ky. L. Rep. 1578; Breathitt Coal, etc., Co. *v.* Gregory, 78 S. W. 148, 25 Ky. L. Rep. 1507; Joseph *v.* Lapp, 78 S. W. 1119, 25 Ky. L. Rep. 1875; Goodin *v.* Hays, 88 S. W. 1101, 28 Ky. L. Rep. 112.

*Missouri*.—Duke *v.* Harper, 8 Mo. App. 296; Dempsey *v.* Dorrance, 151 Mo. App. 429, 132 S. W. 33.

*Nevada*.—Quint *v.* Ophir Silver Min. Co., 4 Nev. 304.

*New Hampshire*.—Young *v.* Dearborn, 27 N. H. 324.

*New York*.—Marsh *v.* Holbrook, 3 Abb. App. Dec. 178; Grant *v.* Langley, 34 Misc. 776, 68 N. Y. S. 820; Dailey *v.* Devlin, 21 App. Div. 62, 47 N. Y. S. 296; Whitesell *v.* New Jersey & H. R. R. & F. Co., 68 App. Div. 82, 74 N. Y. S. 217; Johnson *v.* Ravitch, 113 App. Div. 810, 921, 99 N. Y. S. 1059, 100 N. Y. S. 1123.

*North Carolina*.—Leach *v.* Strange, 10 N. C. 601.

*Pennsylvania*.—Com. *v.* Terry, 11 Pa. Super. Ct. 547.

*Texas*.—Sulzbacher *v.* Wilkinson, 1 White & W. Civ. Cas. Ct. App. § 994; Myers *v.* Crockett, 14 Tex. 257; Crye *v.* O'Neal, 135 S. W. 253.

*Utah*.—Price *v.* Western Loan, etc., Co., 35 Utah 379, 19 Ann. Cas. 589, 100 Pac. 677.

*Washington*.—Schultheis *v.* Nash, 27 Wash. 250, 67 Pac. 707.

*West Virginia*.—Matheny *v.* Farley, 66 W. Va. 680, 66 S. E. 1060.

<sup>14</sup> *England*.—Read *v.* Dupper, 6 T. R. 361.

*United States*.—Louisville, etc., R. Co. *v.* Wilson, 138 U. S. 507, 11 S. Ct. 405, 34 U. S. (L. ed.) 1023.

*Alabama*.—Hall *v.* Gunter, 157 Ala. 375, 47 So. 155.

*Arkansas*.—Brodie *v.* Watkins, 33 Ark. 545, 34 Am. Rep. 49.

*California*.—Webb *v.* Trescony, 76 Cal. 621, 18 Pac. 796.

*Georgia*.—Coker *v.* Oliver, 4 Ga. App. 728, 62 S. E. 483.

*Illinois*.—Moore *v.* Robinson, 92 Ill. 491; Mt. Vernon *v.* Patton, 94 Ill. 65; Pratt *v.* Kerns, 123 Ill. App. 86.

*Indiana*.—Scobey *v.* Ross, 5 Ind. 445; French *v.* Cunningham, 149 Ind. 632, 49 N. E. 797.

*Iowa*.—Ellwood *v.* Wilson, 21 Ia.



In some jurisdictions the attorney may recover damages for the breach of the contract of employment;<sup>15</sup> the measure of damages being the unpaid amount of the compensation stipulated for in

523; *Cullison v. Lindsay*, 108 Ia. 124, 78 N. W. 847.

*Kansas*.—*Durkee v. Gunn*, 41 Kan. 496, 21 Pac. 637, 13 Am. St. Rep. 300.

*Kentucky*.—*Majors v. Hickman*, 2 Bibb 217; *Henry v. Vance*, 111 Ky. 72, 63 S. W. 273; *Warren Deposit Bank v. Barelay*, 60 S. W. 853, 22 Ky. L. Rep. 1555; *Breathitt Coal, etc., Co. v. Gregory*, 78 S. W. 148, 25 Ky. L. Rep. 1507; *Joseph v. Lapp*, 78 S. W. 1119, 25 Ky. L. Rep. 1875; *Goodin v. Hays*, 88 S. W. 1101, 28 Ky. L. Rep. 112.

*Maryland*.—*Western Union Tel. Co. v. Semmes*, 73 Md. 9, 20 Atl. 127.

*Massachusetts*.—*Philbrook v. Moxey*, 191 Mass. 33, 77 N. E. 520.

*Michigan*.—*Millard v. Jordan*, 76 Mich. 131, 42 N. W. 1085.

*Minnesota*.—*Moyer v. Cautiony*, 41 Minn. 242, 42 N. W. 1060.

*Missouri*.—*Kersey v. Garton*, 77 Mo. 645; *Reynolds v. Clark County*, 162 Mo. 680, 63 S. W. 382; *McElhinney v. Kline*, 6 Mo. App. 94; *Duke v. Harper*, 8 Mo. App. 296; *Bissell v. Zorn*, 122 Mo. App. 688, 99 S. W. 458; *Young v. Lanznar*, 133 Mo. App. 130, 112 S. W. 17.

*Montana*.—*Harris v. Root*, 28 Mont. 159, 72 Pac. 429; *Foley v. Kleinschmidt*, 28 Mont. 198, 72 Pac. 432.

*Nevada*.—*Quint v. Ophir Silver Min. Co.*, 4 Nev. 304.

*New York*.—*Carey v. Gnant*, 59 Barb. 574; *Matter of Cable*, 114 App. Div. 375, 99 N. Y. S. 1096; *Roake v. Palmer*, 119 App. Div. 64, 103 N. Y. S. 862; *Clark v. Nichols*, 127 App. Div. 219, 111 N. Y. S. 66; *Badger v.*

*Mayer*, 8 Misc. 533, 28 N. Y. S. 765; *Seasongood v. Prager*, 70 Misc. 490, 127 N. Y. S. 482; *Yucells v. Hyman*, 84 N. Y. S. 460.

*Pennsylvania*.—*Com. v. Terry*, 11 Pa. Super. Ct. 547.

*Texas*.—*Allecorn v. Butler*, 9 Tex. 56; *Myers v. Crockett*, 14 Tex. 257; *Hill v. Cunningham*, 25 Tex. 25.

*Utah*.—*Potter v. Ajax Min. Co.*, 22 Utah 273, 61 Pac. 999; *Price v. Western Loan, etc., Co.*, 35 Utah 379, 19 Ann. Cas. 589, 100 Pac. 677.

*Virginia*.—*Miller v. Penniman*, 110 Va. 780, 67 S. E. 516; *Howard v. Charleston First Nat. Bank*, 27 S. E. 492.

*West Virginia*.—*Polsley v. Anderson*, 7 W. Va. 202, 23 Am. Rep. 613; *Peck v. Marling*, 22 W. Va. 708; *Tomlinson v. Polsley*, 31 W. Va. 198, 5 S. E. 457; *Matheny v. Farley*, 66 W. Va. 680, 66 S. E. 1060.

<sup>15</sup> *Arkansas*.—*Brodie v. Watkins*, 33 Ark. 545, 34 Am. Rep. 49.

*California*.—*Webb v. Trescony*, 76 Cal. 621, 18 Pac. 796.

*Kentucky*.—*Henry v. Vance*, 111 Ky. 72, 63 S. W. 273; *Breathitt Coal, etc., Co. v. Gregory*, 78 S. W. 148, 25 Ky. L. Rep. 1507; *Joseph v. Lapp*, 78 S. W. 1119, 25 Ky. L. Rep. 1875; *Goodin v. Hays*, 88 S. W. 1101, 28 Ky. L. Rep. 112.

*Missouri*.—*Kersey v. Garton*, 77 Mo. 645; *McElhinney v. Kline*, 6 Mo. App. 94.

*Nebraska*.—*Shevalier v. Doyle*, 88 Neb. 560, 130 N. W. 417.

*New York*.—*Carey v. Gnant*, 59 Barb. 574; *Carlisle v. Barnes*, 102 App. Div. 573, 92 N. Y. S. 917; *Bad-*

the contract,<sup>16</sup> excepting that, as a general rule, where the fees are contingent on success the damages must be confined to reasonable compensation for the services actually rendered.<sup>17</sup>

*ger v. Mayer*, 8 Misc. 533, 28 N. Y. S. 765; *Grant v. Langley*, 34 Misc. 776, 68 N. Y. S. 820.

*North Carolina*.—*Johnston v. Cutchin*, 133 N. C. 119, 45 S. E. 522.

*Ohio*.—*Scheinsohn v. Lemonek*, 84 Ohio St. 424, Ann. Cas. 1912C 737, 95 N. E. 913.

*Texas*.—*Lynch v. Munson*, 61 S. W. 140.

*West Virginia*.—*Polsley v. Anderson*, 7 W. Va. 202, 23 Am. Rep. 613.

**16** *Arkansas*.—*Brodie v. Watkins*, 33 Ark. 545, 34 Am. Rep. 49; *Weil v. Fineran*, 78 Ark. 87, 93 S. W. 568.

*California*.—*Webb v. Trescony*, 76 Cal. 621, 18 Pac. 796; *Bartlett v. Odd-Fellows' Sav. Bank*, 79 Cal. 218, 21 Pac. 743, 12 Am. St. Rep. 139.

*District of Columbia*.—*MacKie v. Howland*, 3 App. Cas. 461.

*Michigan*.—*Millard v. Jordan*, 76 Mich. 131, 42 N. W. 1085.

*Minnesota*.—*Moyer v. Cantieny*, 41 Minn. 242, 42 N. W. 1060.

*Missouri*.—*Kersey v. Garton*, 77 Mo. 645, 5 Ky. L. Rep. 2, 16 Cent. L. J. 472; *McElhinney v. Kline*, 6 Mo. App. 94.

*New York*.—*Marsh v. Holbrook*, 3 Abb. App. Dec. 176; *Carlisle v. Barnes*, 102 App. Div. 573, 92 N. Y. S. 917; *Grant v. Langley*, 34 Misc. 776, 68 N. Y. S. 820.

*Ohio*.—*Scheinsohn v. Lemonek*, 84 Ohio St. 424, Ann. Cas. 1912C 737, 95 N. E. 913.

*Tennessee*.—*McClain v. Williams*, 8 Yerg. 230; *Cantrell v. Chism*, 5 Sneed 116. See also *Bright v. Taylor*, 4 Sneed 159.

*Texas*.—*Alcorn v. Butler*, 9 Tex. 56; *Hill v. Cunningham*, 25 Tex. 25.

*Washington*.—*Schultheis v. Nash*, 27 Wash. 250, 67 Pac. 707; *Sessions v. Warwick*, 46 Wash. 165, 89 Pac. 482.

*West Virginia*.—*Polsley v. Anderson*, 7 W. Va. 202, 23 Am. Rep. 613.

*Reason of Rule*.—In *Kersey v. Garton*, 77 Mo. 646, the court said: "And there is much force in the view that contracts such as the one before us are, from the nature of the engagement, from the peculiar and confidential relations existing between the parties thereto, from the fact that an attorney when discharged by his client is prevented from accepting employment in the same cause by the adverse party, from the fact of its being practically impossible to determine the value of an attorney's services up to the time of his dismissal, and from the fact of the impossibility of ascertaining the measure of his damages—that these circumstances should exempt such a contract from those rules which prevail in cases of contracts differing so widely in these essential particulars from that under discussion, and should fix the measure of damages at the price agreed to be paid."

*Allowance for Part Unperformed*.—In *Goodin v. Hays*, 88 S. W. 1101, 28 Ky. L. Rep. 112, it was said that the jury should allow the contract price abated by such sum as reasonably represents the unperformed part of the work undertaken. And see *Weil v. Fineran*, 78 Ark. 87, 93 S. W. 568.

**17** *Western Union Tel. Co. v.*

But where the attorney has been discharged for good and justifiable cause,<sup>18</sup> he is precluded from recovering either in damages or on a *quantum meruit*.<sup>19</sup>

Semmes, 73 Md. 9, 20 Atl. 127; Badger v. Mayer, 8 Misc. 533, 28 N. Y. S. 765; Polsley v. Anderson, 7 W. Va. 202, 23 Am. Rep. 613.

Where a contract is to perform something in the future, the successful result of which is therefore necessarily uncertain, and performance is wrongfully prevented by the other party, a speculative element is unavoidably introduced into the question of damages, but cannot take away the right to just compensation. In such cases all that can be reasonably required of plaintiff is to produce to the jury sufficient evidence, of the best character obtainable, of a fair prospect of success, and the compensation which would have followed. Williams v. Philadelphia, 208 Pa. St. 282, 57 Atl. 578.

<sup>18</sup> Taylor v. Perkins. (Mo.) 157 S. W. 122. And see *supra*, §§ 137, 138.

<sup>19</sup> California.—Cahill v. Baird, 70 Pac. 1061.

Illinois.—Walsh v. Shumway, 65 Ill. 471.

Indiana.—See McDowell v. Baker, 29 Ind. 481.

Kansas.—McArthur v. Fry, 10 Kan. 233.

Missouri.—Taylor v. Perkins, 157 S. W. 122.

New York.—Holmes v. Evans, 129 N. Y. 140, 29 N. E. 233.

Tennessee.—Moyers v. Graham, 15 Lea 57.

*Conduct Adverse to Client.*—Where an attorney was employed to attend to a suit about certain specified lands, "and to attend to all other litigations

concerning said lands, he agreeing to attend to the same and to furnish all moneys necessary to conduct said litigation," and at the time was engaged in prosecuting an action for another party, in reference to the same land, adverse in interest to that of his employer, and continued to prosecute such adverse action, his client was held to have sufficient grounds to discharge him, and when she had done so he could not demand a specific performance on the client's part of the terms of the contract of employment. McArthur v. Fry, 10 Kan. 233. See also generally, *supra*, §§ 152-182, as to representing and acquiring adverse interests.

Where an attorney was employed to defend a party on a criminal charge, upon a fee to be paid after such services were rendered, and upon tendering such services was told by his client that he would no longer need them, as other counsel had been employed, whereupon the attorney informed him that he was ready to comply with his contract, and would make him do so, but volunteered his services and assisted in the prosecution of the case, it was held that although the attorney might have recovered his fee by a continual tender and readiness to perform his part of the contract until the case was ended, yet his volunteering on the other side and actually assisting in the prosecution was an abandonment of the contract, and he thereby forfeited his right to any recovery. Cantrell v. Chism, 5 Sneed (Tenn.) 116.

The right to compensation, and the amount thereof, on the settlement of the cause by the client will be considered hereafter.<sup>20</sup>

**§ 451. Performance Prevented by Substitution.**—While the right of a client to discharge his attorney at any time,<sup>1</sup> and also to substitute another in his stead,<sup>2</sup> is not doubted, nevertheless, in such cases the counsel originally engaged will be protected in the matter of compensation<sup>3</sup> to the extent of the reasonable value of the services performed down to the time the substitution is allowed;<sup>4</sup> and it is immaterial that, under his agreement with the client, his compensation was to be contingent upon the successful outcome of the litigation,<sup>5</sup> providing such agreements are not fatal-

*Compare* Goodin v. Hays, 88 S. W. 1101, 28 Ky. L. Rep. 112, wherein it was said that if the attorney was discharged for cause, he should be allowed reasonable compensation for his services without regard to the contract under which services were rendered.

<sup>20</sup> See *infra*, §§ 456-460.

<sup>1</sup> See *supra*, §§ 137, 138.

<sup>2</sup> See *supra*, §§ 143-150.

<sup>3</sup> See *supra*, §§ 147, 148.

<sup>4</sup> *United States*.—Sloo v. Law, 4 Blatchf. 268, 22 Fed. Cas. No. 12958; Such v. New York Bank, 121 Fed. 202; Du Bois v. New York, 134 Fed. 570, 69 C. C. A. 112.

*Alabama*.—Coopwood v. Wallace, 12 Ala. 790.

*District of Columbia*.—Mackie v. Howland, 3 App. Cas. 461.

*Kentucky*.—Henry v. Vance, 111 Ky. 72, 63 S. W. 273; Root v. McHavaine, 56 S. W. 498, 22 Ky. L. Rep. 7; Joseph v. Lapp, 78 S. E. 1119, 25 Ky. L. Rep. 1875.

*Louisiana*.—Morel v. New Orleans, 12 La. Ann. 485; Commandeur v. Carrollton, 15 La. Ann. 7; Bright v. Hewes, 18 La. Ann. 666.

*Michigan*.—Detroit v. Whittemore, 27 Mich. 281.

*Missouri*.—State v. Hawkins, 28 Mo. 366.

*New York*.—Creighton v. Ingersoll, 20 Barb. 541; Bryant v. Brooklyn Heights R. Co., 64 App. Div. 542, 72 N. Y. S. 308; Johnson v. Ravitch, 113 App. Div. 810, 99 N. Y. S. 1059; In re Cable, 114 App. Div. 375, 99 N. Y. S. 1096; Frost v. Reinach, 40 Misc. 412, 81 N. Y. S. 246. See also Hammond v. Dean, 4 Hun 131, 6 Thomp. & C. 337; Creiger v. Cheesbrough, 25 How. Pr. 200; Carlisle v. Barnes, 102 App. Div. 573, 92 N. Y. S. 917.

*Texas*.—Raley v. Smith, 73 S. W. 54.

*Washington*.—Payett v. Willis, 23 Wash. 299, 63 Pac. 254; Schulteis v. Nash, 27 Wash. 250, 67 Pac. 707.

*West Virginia*.—Matheny v. Farley, 66 W. Va. 680, 66 S. E. 1060.

*Wisconsin*.—Cotzhausen v. Central Trust Co., 79 Wis. 613, 49 N. W. 158.

<sup>5</sup> *United States*.—Ronald v. Mutual Reserve Fund L. Assoc., 30 Fed. 228; Such v. New York State Bank, 121 Fed. 202; New York Phonograph Co.

ly objectionable under the local law.<sup>6</sup> The amount to which counsel is entitled will be determined by the court with or without the aid of a reference as the circumstances may seem to warrant.<sup>7</sup>

**§ 452. Impossibility of Performance.**—Where complete performance by the attorney of his contract of employment becomes impossible without fault on the part of either party, the attorney may recover the value of the services actually rendered by him.<sup>8</sup> It has been so held where performance was prevented by unforeseen conditions.<sup>9</sup> A like rule prevails where performance

*v. Edison Phonograph Co.*, 150 Fed. 233; *Carver v. U. S.*, 7 Ct. Cl. 499.

*California*.—*Bartlett v. Odd Fellows' Sav. Bank*, 79 Cal. 218, 21 Pac. 743, 12 Am. St. Rep. 139; *Craddock v. O'Brien*, 104 Cal. 217, 37 Pac. 896; *Gage v. Atwater*, 136 Cal. 170, 68 Pac. 581.

*New York*.—*Bryant v. Brooklyn Heights R. Co.*, 64 App. Div. 542, 72 N. Y. S. 308; *Carlisle v. Barnes*, 102 App. Div. 573, 92 N. Y. S. 917; *Roake v. Palmer*, 119 App. Div. 64, 103 N. Y. S. 862.

<sup>6</sup> See *supra*, §§ 386-397, 421-427. See also *Silverman v. Pennsylvania R. Co.*, 141 Fed. 382.

<sup>7</sup> See *supra*, § 148. See also *Scheu v. Blum*, 124 App. Div. 678, 109 N. Y. S. 130; *Frost v. Reinach*, 40 Misc. 412, 81 N. Y. S. 246; *Gardiner v. Tyler*, 36 How. Pr. (N. Y.) 63, 5 Abb. Pr. N. S. 33.

*On the withdrawal* of an application for substitution, an order fixing the amount of compensation to which the original counsel is entitled, as a condition precedent, is unenforceable. *Gardiner v. Tyler*, 36 How. Pr. (N. Y.) 63, 5 Abb. Pr. N. S. 33.

<sup>8</sup> *Moore v. Robinson*, 92 Ill. 491; *Lewis v. Omaha St. R. Co.*, (Neb.) 114 N. W. 281.

<sup>9</sup> *Warren Dep. Bank v. Barclay*, 60 S. W. 853, 22 Ky. L. Rep. 1555.

*Act of God or Unavoidable Casualty*.—Although it is true that a contract for legal services is personal in its nature and non-assignable, and that disability discharges such a contract, nevertheless, the occurrence of a disability after a special contract for services has been partly performed, does not prevent the disabled party, if the breach of the contract was made through no fault of his own, but by the act of God or unavoidable casualty, from recovering upon a *quantum meruit* for the reasonable value of the services rendered prior to the disability. This is the more modern rule, and is founded on justice and right. *Lewis v. Omaha St. R. Co.*, (Neb.) 114 N. W. 281.

*Where an attorney becomes a judge*, and, in consequence, is prohibited by law from appearing as an attorney in any court of record in the state, he will nevertheless be entitled to compensation for services rendered in a case up to the time of his incapacity. *Baird v. Rateliff*, 10 Tex. 81.

*Statute Declared Void*.—An attorney employed to conduct proceedings under a statute for the drainage of swamp lands is entitled to recover for

becomes impossible through the fault of both parties.<sup>10</sup> It is otherwise, however, where such impossibility is caused by the fault of the attorney; thus if the attorney becomes incapable of completing the services he has undertaken by reason of his being disbarred, he will not be entitled to claim anything under his contract of employment by way of compensation.<sup>11</sup> But the physical disability of the attorney to perform the duties undertaken by him does not, it seems, prevent him from recovering the reasonable value of his services.<sup>12</sup>

**§ 453. Abandonment by Attorney.** — The right of an attorney to compensation when he has abandoned his contract of employment depends on whether he was justified in the abandonment. This subject has been considered heretofore in connection with the termination of the relation of attorney and client.<sup>13</sup>

Where an attorney agrees to render certain services for a stipulated fee, and performance on his part is a condition precedent to payment, his failure, without justification, to perform the business so undertaken will be deemed to be a forfeiture of his right to compensation under the contract.<sup>14</sup> Indeed, to demand compensa-

services rendered in litigation involving the validity of the statute and appeals necessitated in such proceedings where the clients knew of the litigation and of the attorney's appearance in good faith in their behalf, in support of the validity of the only statute authorizing the proceedings, though he failed to accomplish the result desired because of the statute being declared invalid. *Sanford v. Bronson*, 109 App. Div. 835, 96 N. Y. S. 859.

<sup>10</sup> *Price v. Western Loan & Savings Co.*, 35 Utah 379, 19 Am. Cas. 589, 100 Pac. 677.

<sup>11</sup> *Moyers v. Graham*, 15 Lea (Tenn.) 57; *Threadgill v. Shaw*, (Tex.) 148 S. W. 825.

<sup>12</sup> *Lewis v. Omaha St. R. Co.*, (Neb.) 114 N. W. 281.

<sup>13</sup> See *supra*, § 139.

<sup>14</sup> *Alabama*.—*Troy v. Hall*, 157 Ala. 592, 47 So. 1035.

*California*.—*Houghton v. Clarke*, 80 Cal. 417, 22 Pac. 288.

*Connecticut*.—*Brackett v. Norton*, 4 Conn. 517, 10 Am. Dec. 179.

*Illinois*.—*Morgan v. Roberts*, 38 Ill. 65.

*Kentucky*.—*Henry v. Vance*, 111 Ky. 72, 63 S. W. 273.

*Missouri*.—*White v. Wright*, 16 Mo. App. 551; *Blanton v. King*, 73 Mo. App. 148; *Young v. Lanzmar*, 133 Mo. App. 130, 112 S. W. 17.

*New York*.—*Holmes v. Evans*, 129 N. Y. 140, 29 N. E. 233; *Cary v. Cary*, 97 App. Div. 471, 89 N. Y. S. 1061; *McDonald v. De Vito*, 118 App. Div. 566, 103 N. Y. S. 508; *Buckley v. Buckley*, 64 Hun 632 mem., 18 N. Y.

tion in the face of such an abandonment has been considered unprofessional and unconscientious.<sup>15</sup> Thus, it is a complete defense to an action on a *quantum meruit* for professional services, that the attorney agreed before entering on the case to prosecute it to the court of last resort for a certain fee, and that subsequently, after losing it below, he refused to prosecute it to the highest court unless paid for it, and that, thereupon, he was dismissed.<sup>16</sup> So, an attorney who contracts to collect a debt on a contingent fee is precluded from recovering such fee where he abandons the collection,<sup>17</sup> and it is immaterial that his client subsequently collected the amount due.<sup>18</sup>

The mere fact that counsel whose compensation was contingent on the result of litigation, requested a "payment on account of services," pending the action, which was not granted, does not consti-

S. 607. And see *Seasongood v. Prager*, 146 App. Div. 833, 131 N. Y. S. 771, reversing 70 Misc. 490, 127 N. Y. S. 482.

*North Carolina*.—*Potts v. Francis*, 43 N. C. 300.

*South Carolina*. — *Clendinen v. Black*, 2 Bailey Eq. 488, 23 Am. Dec. 149.

*Texas*.—*Crye v. O'Neal*, 135 S. W. 253.

*Virginia*.—*Miller v. Penniman*, 110 Va. 780, 67 S. E. 516.

*Washington*.—*Farwell v. Colman*, 35 Wash. 308, 77 Pac. 379.

*West Virginia*.—*Matheny v. Farley*, 66 W. Va. 680, 66 S. E. 1060.

It is the peculiar tact and ability of the particular lawyer that is contracted for, and naturally the client must have an interest in retaining the attorney throughout the litigation so as to avail himself of the advantages derived by the counsel's thorough acquaintance with the law and the facts acquired during the progress of the litigation. *Blanton v. King*, 73 Mo. App. 148.

Where a client engages a firm to prosecute a case, and one of the firm dies, and the client consents that a new firm into which the surviving partner enters shall continue in the case, and the senior member abandons the case, and the surviving partner of the old firm does nothing except to keep himself informed as to the status of the case for over five years, his conduct is a ratification of the act of the senior member in abandoning the case, and neither the new firm nor the surviving partner of the old firm is entitled to compensation. *Troy v. Hall*, 157 Ala. 592, 47 So. 1035.

<sup>15</sup> *Potts v. Francis*, 43 N. C. 300.

<sup>16</sup> *Douglass v. Downend*, 30 Ohio Cir. Ct. Rep. 649.

<sup>17</sup> *Pennington v. Underwood*, 56 Ark. 53, 19 S. W. 108; *Seoville v. School Trustees*, 65 Ill. 523; *Simrall v. Morton*, 12 S. W. 185, 12 Ky. L. Rep. 31.

<sup>18</sup> *Seoville v. School Trustees*, 65 Ill. 523.

tute an abandonment;<sup>19</sup> but, under such a contract, an attorney who refuses to go on with the litigation without an agreement for additional compensation, is chargeable with the abandonment of his employment.<sup>20</sup> So, abandonment may be inferred from long-continued neglect.<sup>1</sup> Advising the client to dispense with either the counsel giving the advice or his associate is not an abandonment.<sup>2</sup>

Where an attorney is justified in abandoning the employment,<sup>3</sup> he is entitled to reasonable compensation for the services actually rendered.<sup>4</sup> He should, however, notify the client of his withdrawal; and, although the consent of the court is not always essential,<sup>5</sup> especially where the attorney must act hurriedly, or does not appear as attorney of record, one who appears of record as attorney should not abandon the cause without the sanction of the court, not only because of the confusion which might ensue from the unheralded abandonment of causes by attorneys, but also for the protection of the attorney should afterthought, or the lack of it, be instrumental in testing his liability for negligence.<sup>6</sup> The burden of proof is on a client who asserts that the attorney has forfeited his claim to compensation by abandoning the employment.<sup>7</sup>

<sup>19</sup> Frink *v.* McComb, 60 Fed. 486.

<sup>20</sup> Houghton *v.* Clark, 80 Cal. 417, 22 Pac. 288; Southern Nat. Bank *v.* Curtis, (Tex.) 36 S. W. 911.

<sup>1</sup> Rousseau *v.* Marionneaux, 28 La. Ann. 293; Buckley *v.* Buckley, 18 N. Y. S. 607; Miller *v.* Penniman, 110 Va. 780, 67 S. E. 516.

<sup>2</sup> Ryan *v.* Martin, 18 Wis. 672.

<sup>3</sup> As to the justification for abandonment by an attorney, see *supra*, § 139.

<sup>4</sup> Iowa.—Cullison *v.* Lindsay, 108 Ia. 124, 78 N. W. 847.

Kentucky.—Sweeney *v.* Kerr, 25 S. W. 273; Asher *v.* Beckner, 41 S. W. 25, 19 Ky. L. Rep. 521.

Louisiana.—Cooley *v.* Doherty, 5 La. Ann. 163.

Massachusetts.—Eliot *v.* Lawton, 7

Allen 274, 83 Am. Dec. 683; Powers *v.* Manning, 154 Mass. 370, 28 N. E. 290, 13 L.R.A. 258.

Missouri.—Young *v.* Lanznar, 133 Mo. App. 130, 112 S. W. 17.

New York.—Tenney *v.* Berger, 93 N. Y. 524, 45 Am. Rep. 263; Pickard *v.* Pickard, 83 Hun 338, 31 N. Y. S. 987; Clark *v.* Nichols, 127 App. Div. 219, 11 N. Y. S. 66; Avery *v.* Jacob, 59 Super. Ct. 585 mem., 15 N. Y. S. 564.

West Virginia.—Matheny *v.* Farley, 66 W. Va. 680, 66 S. E. 1060.

<sup>5</sup> Powers *v.* Manning, 154 Mass. 370, 28 N. E. 290, 13 L.R.A. 258.

<sup>6</sup> See *supra*, § 139.

<sup>7</sup> Craddock *v.* O'Brien, 104 Cal. 217, 37 Pac. 896.



§ 454. **Death of Attorney.** — Although the relation of attorney and client is terminated by the attorney's death,<sup>8</sup> his representatives may recover the fair value of the services rendered by him down to the time of his decease,<sup>9</sup> and such disbursements as he may have made.<sup>10</sup> And where a contract was made for the services, at a stipulated compensation, of one of a firm of attorneys, who died before the action was brought to trial, the client could not refuse the services of the surviving partner without a tender of a fair compensation for the services rendered in preparing for the trial; and where the services were rendered by such partner with due professional skill and diligence, he was entitled to the entire fee.<sup>11</sup> But no recovery can be had for services which were rendered under a contract whereby payment was made contingent on success, until the controversy has been determined.<sup>12</sup> It has also been held that there can be no recovery where an attorney dies before his contract of employment has been substantially per-

<sup>8</sup> See *supra*, § 141. See also Clifton *v.* Clark, 83 Miss. 446, 1 Ann. Cas. 396, 36 So. 251, 102 Am. St. Rep. 458, 66 L.R.A. 821.

<sup>9</sup> *Kentucky*.—Hardin *v.* McKittrick, 5 J. J. Marsh. 667; McGill *v.* McGill, 2 Mete. 258; Baylor *v.* Morrison, 2 Bibb 103.

*Maryland*.—Gordon *v.* Miller, 14 Md. 204.

*Massachusetts*.—Tapley *v.* Coffin, 12 Gray 420.

*Missouri*.—Callahan *v.* Shotwell, 60 Mo. 398.

*New Mexico*.—Johnston *v.* Bernalillo County, 12 N. M. 237, 78 Pac. 43.

*New York*.—Seymour *v.* Cagger, 13 Hun 29; Boyd *v.* Daily, 85 App. Div. 581, 83 N. Y. S. 539, *affirmed* 176 N. Y. 556, 613, 68 N. E. 1114.

*South Carolina*.—Clendinen *v.* Black, 2 Bailey L. 488.

*Tennessee*.—Bills *v.* Polk, 4 Lea 494.

*Texas*.—Landa *v.* Shook, 31 S. W. 57.

*Virginia*.—Nickels *v.* Kane, 82 Va. 309.

In an action by an administrator to recover for legal services rendered by his intestate, if deceased was employed as counsel only, to be called when his services were needed, and if the suit ended by compromise in the negotiation of which the services of the attorney were not required, the client may be liable on the contract for the full amount of the compensation, though the intestate died before the end of the suit. Tewkesbury *v.* Beekwith, 46 Ill. App. 323. And see *supra*, § 406.

<sup>10</sup> Badger *v.* Cellar, 41 App. Div. 599, 58 N. Y. S. 653.

<sup>11</sup> Smith *v.* Hill, 13 Ark. 173. But see Baxter *v.* Billings, 83 Fed. 790, 28 C. C. A. 85.

<sup>12</sup> Badger *v.* Cellar, 41 App. Div. 599, 58 N. Y. S. 653. But see Sargent *v.* McLeod, 155 App. Div. 21,

formed;<sup>13</sup> and that the client may recover back unearned fees which were paid to the attorney in advance.<sup>14</sup> So, where an attorney took a conveyance of a tract of land to secure his fee for services to be performed in certain cases, of which services his death prevented more than a partial performance, it was held that a bill in equity would lie against his estate to set aside the conveyance upon a tender of so much of the fee agreed upon as was found to be really due.<sup>15</sup>

**§ 455. Death of Client.** — It has been stated heretofore that the authority of an attorney terminates on the death of his client, and that he cannot act on behalf of the estate unless he has been retained by those who represent it.<sup>16</sup>

In the absence of a special contract in regard to the duty of the attorney to proceed with the business in which he was employed until its final determination, he is entitled only to compensation for the services rendered down to the time of the client's death;<sup>17</sup> and this is true although the right to compensation is contingent on success.<sup>18</sup>

But the attorney's right to compensation will not be affected

139 N. Y. S. 666, where a settlement due wholly to the attorney's services was obtained shortly after his death.

<sup>13</sup> If a lawyer dies before he has commenced, or before he has prosecuted to a decree or settlement, a litigation which he has undertaken to conduct for a certain compensation, his contract is at an end, and no one can recover the price stipulated, because no substitute or successor can supply to his client the use of the learning, ability, and integrity for which he contracted. *Baxter v. Billings*, 83 Fed. 790, 49 U. S. App. 767, 28 C. C. A. 85.

<sup>14</sup> *Callahan v. Shotwell*, 60 Mo. 398; *McCammon v. Peck*, 6 Ohio Cir. Dec. 504, 9 Ohio Cir. Ct. 589.

<sup>15</sup> *Callahan v. Shotwell*, 60 Mo. 398.

<sup>16</sup> See *supra*, § 140. See also *La-*

*bauve's Succession*, 34 La. Ann. 1191; *Villhauer v. Toledo*, 5 Ohio Dec. 8.

An attorney's power ceases on the death of his client, and a revivor of the suit afterwards in the name of the representatives without their authority is unwarranted. *Campbell v. Kineaid*, 3 T. B. Mon. (Ky.) 68.

<sup>17</sup> In *re Young*, 3 Md. Ch. 461; *Avery v. Jacob*, 59 Super. Ct. 585, 15 N. Y. S. 564.

*Defense of one accused of crime.* — *Agnew v. Walden*, 84 Ala. 503, 4 So. 672; *Headley v. Good*, 24 Tex. 232.

<sup>18</sup> *Bunn v. Prather*, 21 Ill. 217; *Villhauer v. Toledo*, 5 Ohio Dec. 8. See also *Johnston v. Reilly*, 68 N. J. Eq. 130, 59 Atl. 1044.

Where a person employs attorneys to recover damages for personal injuries, they to have half of any set-

by the death of his client where it has become vested by a substantial performance,<sup>19</sup> or where it is coupled with an interest;<sup>20</sup> such, for instance, as the accrual of a lien,<sup>1</sup> or the rendition of valuable services.<sup>2</sup>

The fact that the client's death renders the services of the

tlement made, and dies before settlement, the attorneys cannot, for their services, reach, upon a *quantum meruit*, a fund which the defendant paid to the executors of the deceased in settlement of the claim, as such fund represents a new and different cause of action—the damages which his estate suffered. In re Carrig, 36 Misc. 612, 73 N. Y. S. 1123.

An obligation to an attorney, on condition he shall succeed in a suit for the obligor, is not made absolute by the death of the obligor preventing the success; nor after its revivor in name of the heirs by the attorney with their consent, by a compromise made by the heirs, and the consequent dismissal of the suit without his consent. *Campbell v. Kincaid*, 3 T. B. Mon. (Ky.) 68.

<sup>19</sup> *An administrator cannot annul a valid contract made with an attorney under which services have been faithfully rendered.* *Wylie v. Cox*, 15 How. 415, 14 U. S. L. ed. 753.

In *Price v. Hoeberle*, 25 Mo. App. 201, it was said: "It thus appears that the plaintiff had made with the decedent, in her lifetime, a contract, the performance of which he had entered upon, and under which a substantial right had accrued to him. At the time of her death that right was in the nature of a vested right, subject, of course, to be defeated by the failure on his part to prosecute

to the end the duties which he had engaged to perform under the contract. In this state of the case, his contract was not determined by the death of Mrs. Roberts [the plaintiff]. Nor had the administrator any power to determine it without cause, if he had been so minded."

In *Labauve's Succession*, 34 La. Ann. 1187, it was said that the death of the client does not dissolve the contract of employment, and that the attorney can and should continue his services to accomplish the purpose of his employment, unless prohibited by the legal representatives of the client, and, where the attorney is not thus forbidden to act, the death of the client does not have the effect of itself to make the fees of the attorney exigible.

<sup>20</sup> See *supra*, § 140. See also *Villhauer v. Toledo*, 5 Ohio Dec. 8.

<sup>1</sup> *Wylie v. Cox*, 15 How. 415, 14 U. S. (L. ed.) 753.

<sup>2</sup> *Grapel v. Hodges*, 112 N. Y. 419, 20 N. E. 542, *affirming* 49 Hun 107, 1 N. Y. S. 823.

An attorney agreed with his client to perform professional services for which he was to be paid a fee on the determination of the suit: before the suit was determined the client died, and it was held that the attorney could not sue for his fee before the determination of the suit. *Triplett v. Mockbees*, 5 J. J. Marsh. (Ky.) 219.

attorney unnecessary, is no defense to an action on an obligation given to the attorney to secure his fees.<sup>3</sup>

*On Settlement by Client.*

§ 456. **General Rule.**—As a general rule the client has a right at any time before judgment to compromise or dismiss his action without his attorney's consent, and even over the objection of his attorney;<sup>4</sup> indeed, an agreement whereby such right of set-

<sup>3</sup> *Headley v. Good*, 24 Tex. 232. See also *Agnew v. Walden*, 84 Ala. 502, 4 So. 672, wherein it was said that the retainer of an attorney in a criminal case devolves upon him the duty of rendering all the professional aid and service necessary and proper in the preparation and conduct of the defense, according to the general routine of such prosecutions, up to the trial and final judgment, or other termination of the case; and a note being given on such retainer in a case of homicide, the death of the maker by mob violence, before trial, does not constitute an entire failure of consideration, though admissible evidence as showing a partial failure.

<sup>4</sup> *United States*.—*Platt v. Jerome*, 19 How. 384, 15 U. S. (L. ed.) 623; *Swanston v. Morning Star Min. Co.*, 4 McCrary 241; *Peterson v. Watson*, 1 Blatchf. & H. 487, 19 Fed. Cas. No. 11,937; *Brooks v. Snell*, 1 Sprague 48, 4 Fed. Cas. No. 1,961; *Purcell v. Lincoln*, 1 Sprague 230, 20 Fed. Cas. No. 11,471; *Swanson v. Chicago, etc., R. Co.*, 35 Fed. 638.

*District of Columbia*.—*Lamont v. Washington, etc., R. Co.*, 2 Mackey 502.

*Georgia*.—*Gray v. Lawson*, 36 Ga. 629; *Hawkins v. Loyless*, 39 Ga. 5; *Green v. Southern Express Co.*, 39 Ga. 20; *Jones v. Morgan*, 39 Ga. 310, 99

Am. Dec. 458; *Harris v. Tison*, 63 Ga. 629, 36 Am. Rep. 126.

*Illinois*.—*Henchey v. Chicago*, 41 Ill. 136.

*Indiana*.—*Hanna v. Island Coal Co.*, 5 Ind. App. 163, 31 N. E. 846.

*Iowa*.—*Casar v. Sargeant*, 7 Ia. 317; *Ellwood v. Wilson*, 21 Ia. 523; *Cheshire v. Des Moines City R. Co.*, 153 Ia. 88, 133 N. W. 324.

*Kentucky*.—*Wood v. Anders*, 5 Bush 601; *Rowe v. Fogle*, 88 Ky. 105, 10 S. W. 426, 2 L.R.A. 708.

*Maine*.—*Potter v. Mayo*, 3 Me. 34, 14 Am. Dec. 211; *Hobson v. Watson*, 34 Me. 20, 56 Am. Dec. 632.

*Massachusetts*.—*Gatchell v. Clark*, 5 Mass. 309; *Simmons v. Almy*, 103 Mass. 33.

*Michigan*.—*Parker v. Blighton*, 32 Mich. 266. Compare *Millard v. Jordan*, 76 Mich. 131, 42 N. W. 1085.

*Mississippi*.—*Mosely v. Jamison*, 71 Miss. 456, 14 So. 529.

*Missouri*.—*Reynolds v. Clark County*, 162 Mo. 680, 63 S. W. 382; *Alexander v. Grand Ave. R. Co.*, 54 Mo. App. 66.

*Nebraska*.—*Lavender v. Atkins*, 20 Neb. 206, 29 N. W. 467; *Aspinwall v. Sabin*, 22 Neb. 73, 34 N. W. 72, 3 Am. St. Rep. 258.

*New Hampshire*.—*Young v. Dearborn*, 27 N. H. 327.

*New Jersey*.—*Den v. Heister*, 17 N.

tlement is forbidden is generally considered to be void as against public policy.<sup>5</sup> Where a settlement has been so effected the attorney, in the absence of an express agreement for a fixed fee, can only recover the reasonable value of the services rendered by him down to the date of the settlement.<sup>6</sup>

But the mere fact that a claim sued for is paid directly to the client does not deprive the attorney of his right to compensation;<sup>7</sup>

J. L. 438; *Weller v. Jersey City, etc., R. Co.*, 68 N. J. Eq. 659, 6 Ann. Cas. 442, 61 Atl. 459, *affirming* 66 N. J. Eq. 11, 57 Atl. 730.

*New York*.—*Sweet v. Bartlett*, 4 Sandf. 661; *Pearl v. Robitchek*, 2 Daly 138; *Sullivan v. O'Keefe*, 53 How. Pr. 426; *McDowell v. Second Ave. R. Co.*, 4 Bosw. 670; *Lee v. Vacuum Oil Co.*, 126 N. Y. 579, 27 N. E. 1018; *Diamond Soda Water Mfg. Co. v. Hegeman*, 74 App. Div. 430, 77 N. Y. S. 417; *Publishers' Printing Co. v. Gillin Printing Co.*, 16 Misc. 558, 25 Civ. Pro. 327, 38 N. Y. S. 784.

*North Dakota*.—*Paulson v. Lyson*, 12 N. D. 354, 1 Ann. Cas. 245, 97 N. W. 533.

*South Carolina*.—*Miller v. Newell*, 20 S. C. 123, 47 Am. Rep. 833.

*South Dakota*.—*Grantz v. Deadwood Terra Min. Co.*, 17 S. D. 51, 95 N. W. 277.

*Tennessee*.—*Johnson v. Story*, 1 Lea 114; *Yoakley v. Hawley*, 5 Lea 673; *Stephens v. Nashville, etc., R. Co.*, 10 Lea 448; *Sharpe v. Allen*, 11 Lea 518; *Covington v. Bass*, 88 Tenn. 496, 12 S. W. 1033. *Compare* *Pleasants v. Kortrecht*, 5 Heisk. 694.

*Vermont*.—*Foot v. Tewksbury*, 2 Vt. 97; *Hutchinson v. Howard*, 15 Vt. 544; *Hooper v. Welch*, 43 Vt. 169, 5 Am. Rep. 267.

*Wisconsin*.—*Kusterer v. Beaver Dam*, 56 Wis. 471, 14 N. W. 617, 43 Am. Rep. 725.

<sup>5</sup> See *supra*, §§ 390, 435.

It is universally considered that the interests of justice are best subserved by allowing parties to litigation full liberty to compromise and settle it at any time during its pendency, without interference by third persons, when the whole legal and equitable title to the cause of action rests in the plaintiff, and the sole responsibility to answer to the plaintiff's claim rests upon the defendant. *Weller v. Jersey City, etc., R. Co.*, 68 N. J. Eq. 659, 6 Ann. Cas. 442, 61 Atl. 459, *affirming* 66 N. J. Eq. 11, 57 Atl. 730.

<sup>6</sup> *Colorado*.—*Webster v. Rhodes*, 49 Colo. 203, 112 Pac. 324.

*Illinois*.—*Pratt v. Kerns*, 123 Ill. App. 86.

*Iowa*.—*Ellwood v. Wilson*, 21 Ia. 523.

*Kentucky*.—*Bowser v. Patrick*, 65 S. W. 824, 23 Ky. L. Rep. 1578.

*Maryland*.—*Western Union Tel. Co. v. Semmes*, 73 Md. 9, 20 Atl. 127.

*Michigan*.—*Millard v. Jordan*, 76 Mich. 131, 42 N. W. 1085.

*Montana*.—*Harris v. Root*, 28 Mont. 159, 72 Pac. 429.

*New York*.—*Carey v. Guant*, 59 Barb. 574; *Haire v. Hughes*, 127 App. Div. 530, 111 N. Y. S. 892, *affirmed* 197 N. Y. 514, 90 N. E. 1159.

<sup>7</sup> *Pierce v. Parker*, 121 Mass. 403; *Whittle v. Tompkins*, 94 S. C. 237, 77 S. E. 929.

and where an attorney is employed, for a certain sum, to transact a particular piece of business, or conduct litigation, for his client, he will be entitled to the sum agreed upon as well when the client prevents performance by taking the matter into his own hands and settling it, as when the attorney conducts the business to its termination.<sup>8</sup> Thus in a suit for the specific performance of a contract to convey land, made in consideration of the personal services of an attorney at law, it was held that the contract might be enforced in full, though a compromise of the suit for which the attorney was retained had been made by the client.<sup>9</sup>

It has also been held that a client who has placed a claim in the hands of an attorney for collection, and who makes a settlement of any kind of such claim with his debtor, without consulting his attorney and obtaining his consent to the settlement, will be presumed to have collected the claim in full, or to have received such a settlement as was as satisfactory to him as payment in full.<sup>10</sup>

Under a California statute it has been held that while there is an attorney of record, no stipulation as to the conduct or disposal of the action should be entertained by the court unless the same is signed or assented to by such attorney. This rule is considered, in that jurisdiction, to be not only indispensable to the orderly conduct of litigation, but likewise a safeguard to the client.<sup>11</sup>

**§ 457. Rule where Compensation Is Dependent on Success.** — The right of a client to settle his legal controversies may be exercised as well where he has retained counsel whose compensation depends on the successful outcome of business undertaken,<sup>12</sup>

<sup>8</sup> *Coker v. Oliver*, 4 Ga. App. 728, 62 S. E. 483; *Cordes v. Bailey*, 39 Ind. App. 83, 78 N. E. 678, 1060; *Reynolds v. Clark County*, 162 Mo. 680, 63 S. W. 382; *In re Fernbacher*, 18 Abb. N. Cas. (N. Y.) 1.

As to compensation generally, where performance is prevented by the client, see *supra* §§ 450-455.

<sup>9</sup> *Alcorn v. Butler*, 9 Tex. 56.

<sup>10</sup> *Coker v. Oliver*, 4 Ga. App. 728, 62 S. E. 483.

<sup>11</sup> *Boca, etc., R. Co. v. Lassen County Superior Ct.*, 150 Cal. 153, 88 Pac. 718.

<sup>12</sup> *United States*.—*Ronald v. Mutual Reserve Fund L. Assoc.*, 30 Fed. 228; *Such v. New York State Bank*, 121 Fed. 202; *DuBois v. New York*, 134 Fed. 570, 69 C. C. A. 112; *Silverman v. Pennsylvania R. Co.*, 141 Fed. 382; *New York Phonograph Co. v. Edison Phonograph Co.*, 150 Fed. 233; *Carver v. U. S.*, 7 Ct. Cl. 499.

as where no such contingency exists;<sup>13</sup> and it is immaterial that the client contracted not to settle the controversy without the attorney's consent.<sup>14</sup> In some jurisdictions, however, this rule is somewhat restricted; thus in California no stipulation as to the conduct or disposal of a pending action will be entertained by the court unless the same is signed or assented to by the attorney of record.<sup>15</sup>

As to the amount of compensation to which the attorney is entitled where the client thus effects a settlement, there is a conflict of opinion. The general rule, however, is that there can be no recovery under the contract,<sup>16</sup> and that the attorney is confined to the reasonable value of the services rendered by him down to the time of settlement,<sup>17</sup> which, as a rule, is based on the amount

*Kentucky*.—*Henry v. Vance*, 111 Ky. 72, 63 S. W. 273; *Root v. McIlvaine*, 56 S. W. 498, 22 Ky. L. Rep. 7; *Joseph v. Lapp*, 78 S. W. 1119, 25 Ky. L. Rep. 1875.

*Minnesota*.—*Anderson v. Itasca Lumber Co.*, 86 Minn. 480, 91 N. W. 12, 291.

*Missouri*.—*Alexander v. Grand Ave. R. Co.*, 54 Mo. App. 66; *Hurr v. Metropolitan St. R. Co.*, 141 Mo. App. 217, 124 S. W. 1057.

*New York*.—*Wright v. Wright*, 70 N. Y. 96; *Coughlin v. New York Cent., etc., R. Co.*, 71 N. Y. 443, 27 Am. Rep. 75, reversing 8 Hun 136; *In re Snyder*, 190 N. Y. 66, 13 Ann. Cas. 441, 82 N. E. 742, 123 Am. St. Rep. 533, 14 L.R.A.(N.S.) 1101; *Bryant v. Brooklyn Heights R. Co.*, 64 App. Div. 542, 72 N. Y. S. 308; *Johnson v. Ravitch*, 113 App. Div. 810, 99 N. Y. S. 1059; *Haire v. Hughes*, 127 App. Div. 530, 111 N. Y. S. 892. See also *Matter of Goodale*, 58 Misc. 182, 108 N. Y. S. 949. *Compare In re Fernbacher*, 18 Abb. N. Cas. 1.

*Pennsylvania*.—*Britton v. Bese*, 23 Pittsb. Leg. J. N. S. 181.

<sup>13</sup> See the preceding section.

<sup>14</sup> See *supra*, §§ 390, 435.

<sup>15</sup> *Toy v. Haskell*, 128 Cal. 558, 61 Pac. 89, 79 Am. St. Rep. 70; *Boca, etc., R. Co. v. Lassen County Superior Ct.*, 150 Cal. 153, 88 Pac. 718.

<sup>16</sup> *Indiana*.—*French v. Cunningham*, 149 Ind. 632, 49 N. E. 797.

*Kentucky*.—*Campbell v. Kincaid*, 3 T. B. Mon. 68.

*Maryland*.—*Semmes v. Western Union Tel. Co.*, 73 Md. 9, 20 Atl. 127.

*Montana*.—*Harris v. Root*, 28 Mont. 159, 72 Pac. 429.

*New York*.—*Mills v. Fox*, 4 E. D. Smith 220; *Bittiner v. Gomprecht*, 23 Misc. 218, 29 Civ. Proc. 309, 58 N. Y. S. 1011.

<sup>17</sup> *United States*.—*Ryan v. Philadelphia, etc., Coal, etc., Co.*, 189 Fed. 253.

*Illinois*.—*Pratt v. Kerns*, 123 Ill. App. 86.

*Maryland*.—*Semmes v. Western Union Tel. Co.*, 73 Md. 9, 20 Atl. 127.

*Missouri*.—*Duke v. Harper*, 8 Mo. App. 296.

*Montana*.—*Harris v. Root*, 28 Mont. 159, 72 Pac. 429.

for which the settlement was made.<sup>18</sup> Thus where the attorney contracts for a certain percentage of the recovery, he will be entitled to that percentage of the amount paid to his client in satisfaction of the claim;<sup>19</sup> but where the defendant agrees to pay the fees of the plaintiff's attorney, in addition to the sum paid in

*Nevada*.—*Quint v. Ophir Silver Min. Co.*, 4 Nev. 304.

*New York*.—In re Snyder, 190 N. Y. 66, 13 Ann. Cas. 441, 82 N. E. 742, 123 Am. St. Rep. 533, 14 L.R.A. (N.S.) 1101.

*Amount Paid to Associate Counsel*.—Where an attorney, prosecuting an action on a contingent fee basis, retained associate counsel to assist him, the question of the counsel's right to payment is a matter resting between him and the attorney, and is only material to the court, in determining the amount the attorney should receive out of a settlement, as a guide to the value of the services rendered by the attorney in the entire action. *Ryan v. Philadelphia & Reading Coal & Iron Co.*, 189 Fed. 253.

<sup>18</sup> *Arkansas*.—*Bush v. Prescott, etc.*, R. Co., 83 Ark. 210, 103 S. W. 176.

*Colorado*.—*Bogert v. Adams*, 8 Colo. App. 185, 45 Pac. 235.

*Kentucky*.—*Schmitz v. South Covington, etc.*, St. R. Co., 131 Ky. 207, 18 Ann. Cas. 1114, 114 S. W. 1197, 22 L.R.A. (N.S.) 776.

*Missouri*.—*Duke v. Harper*, 8 Mo. App. 296; *Hurr v. Metropolitan St. R. Co.*, 141 Mo. App. 217, 124 S. W. 1057.

*Nevada*.—*Quint v. Ophir Silver Min. Co.*, 4 Nev. 304.

*New York*.—*Pilkington v. Brooklyn Heights R. Co.*, 49 App. Div. 22, 30 Civ. Pro. 276, 63 N. Y. S. 211.

*Invalid Contract*.—A contract for

a contingent fee which is invalid because of a stipulation forbidding settlement which affects the entire contract, does not bind either party as to the amount of the fees fixed therein; but the attorney may recover reasonable compensation. In re Snyder, 190 N. Y. 66, 13 Ann. Cas. 441, 82 N. E. 742, 123 Am. St. Rep. 533, 14 L.R.A. (N.S.) 1101. See also *supra*, § 438.

<sup>19</sup> *Iowa*.—*Ellwood v. Wilson*, 21 Ia. 523; *Rickel v. Chicago, etc.*, R. Co., 112 Ia. 148, 83 N. W. 957.

*Kentucky*.—*Schmitz v. South Covington, etc.*, St. R. Co., 131 Ky. 207, 18 Ann. Cas. 1114, 114 S. W. 1197, 22 L.R.A. (N.S.) 776.

*Missouri*.—*Wait v. Atchison, T. & S. F. R. Co.*, 204 Mo. 491, 103 S. W. 60; *Curtis v. Metropolitan St. R. Co.*, 118 Mo. App. 341, 94 S. W. 762; *Boyle v. Metropolitan St. R. Co.*, 134 Mo. App. 71, 114 S. W. 558; *Hurr v. Metropolitan St. R. Co.*, 141 Mo. App. 217, 124 S. W. 1057; *United Railways Co. v. O'Connor*, 153 Mo. App. 128, 132 S. W. 262. Compare *Duke v. Harper*, 8 Mo. App. 296; *Cosgrove v. Burton*, 104 Mo. App. 698, 78 S. W. 667.

*New York*.—*Marsh v. Holbrook*, 3 Abb. App. Dec. 176; *Pilkington v. Brooklyn Heights R. Co.*, 49 App. Div. 22, 63 N. Y. S. 211; *Neu v. Brooklyn Heights R. Co.*, 113 App. Div. 446, 99 N. Y. S. 290; *Sullivan v. McCann*, 124 App. Div. 126, 108 N. Y. S. 909.



settlement of the action, then the basis of reckoning is the sum paid the client plus the attorney's fee; for instance, if the attorney was to receive one third of the recovery, the sum paid to the client would be deemed to be two thirds of the amount of the settlement, and, therefore, the attorney would be entitled to an amount equivalent to one half, and not one third, of the sum paid to the client.<sup>20</sup>

In some instances, however, the amount for which the client settles is not the basis on which the attorney's compensation is computed, especially where the value of the subject-matter of the litigation may be ascertained with reasonable certainty;<sup>1</sup> thus where a client sold his interest in lands to his adversary for a nominal sum, after he had entered into a contract with an attorney to convey to him a certain part thereof if he succeeded in securing the lands by litigation, it was held that the attorney was not bound by the contract, but might recover the reasonable value of his services.<sup>2</sup> And where the client takes property in settlement, or in part settlement, of his claim, the attorney is entitled to have his fee, when fixed at a percentage of the recovery, computed on the

<sup>20</sup> *Curtis v. Metropolitan St. R. Co.*, 125 Mo. App. 369, 102 S. W. 62; *Boyd v. G. W. Chase & Son Mercantile Co.*, 135 Mo. App. 115, 115 S. W. 1052. See also *Crosby v. Hatch*, (Ia.) 135 N. W. 1079. But see *Schmitz v. South Covington, etc., R. Co.*, 131 Ky. 207, 18 Ann. Cas. 1114, 114 S. W. 1197, 22 L.R.A.(N.S.) 776 (*apparently contra*).

<sup>1</sup> Where the plaintiff compromises with the defendant, and the defendant, as consideration for the dismissal of the action, pays plaintiff a certain amount, and, in addition thereto, assumes the payment of the fee of plaintiff's attorney and the costs of the action, the measure of defendant's liability to the attorney is the reasonable fee of the attorney, allowed at the contract price, abated by such sum as is reasonably represented by

the unperformed part of the labor, though the fee as thus estimated may exceed the amount paid by defendant to plaintiff. *Bowser v. Patrick*, 65 S. W. 824, 23 Ky. L. Rep. 1578.

Where an attorney, having a contract with his client for forty per cent of the cause of action, served defendant with notice of such contract in accordance with the statute creating attorney's liens, defendant could not bind plaintiff by a settlement contract with the client, to which plaintiff was not a party, in which defendant attempted to limit plaintiff's fee to forty per cent of the amount paid the claimant. *Boyd v. G. W. Chase & Son Mercantile Co.*, 135 Mo. App. 115, 115 S. W. 1052.

<sup>2</sup> *Duke v. Harper*, 8 Mo. App. 296. See to the same effect *Millard v. Jordan*, 76 Mich. 131, 42 N. W. 1085.

fair value of the property, without regard to the price at which it was taken.<sup>3</sup> So, in an action against a city on its bonds, brought by an attorney whose fee was contingent upon the recovery of the full amount, a settlement by the plaintiff for less than the face value of the recovery was held to be a waiver of the right to insist on the collection of the full amount of the bonds, as a prerequisite to the attorney's right to the compensation provided for in the contract.<sup>4</sup> And where, owing to the efforts of his attorney, the client receives in settlement as much or more than he would have received from the successful outcome of the litigation, the attorney will be entitled to the price fixed by the contract.<sup>5</sup> In Texas it has been held that where the attorney contracts with his client for a contingent fee, and the client compromises the suit without the attorney's consent, the attorney will be entitled to recover the whole amount of the fee in like manner as if the contingency, upon which the payment of the fee was made to depend, had transpired.<sup>6</sup> It has also been held in that jurisdiction that a contract whereby an interest, equivalent to a certain percentage of the sum to be recovered, is assigned to the attorney, authorizes him to maintain the action in the name of his client,<sup>7</sup> and, therefore, that a settlement by the client can only be effective to the extent of the unassigned portion of the claim sued upon.<sup>8</sup> This, however, is but a general rule. Cases may, and undoubtedly do, present themselves in which the attorney would not be permitted to control the suit so as to prevent a compromise; or, in other words, where the attorney would not be permitted to continue the litigation to the injury of the client.<sup>9</sup>

**§ 458. Fraudulent Settlements.** — The right of litigants to settle their controversies amicably, and without the interference of counsel or other persons,<sup>10</sup> does not justify them in perpetrat-

<sup>3</sup> *Barcus v. Gates*, 130 Fed. 364, *affirmed* 136 Fed. 184, 69 C. C. A. 200; *Coker v. Oliver*, 4 Ga. App. 728, 62 S. E. 483.

<sup>4</sup> *Larned v. Dubuque*, 86 Ia. 166, 53 N. W. 105.

<sup>5</sup> *Webster v. Rhodes*, 49 Colo. 203, 112 Pac. 324.

<sup>6</sup> *Hill v. Cunningham*, 25 Tex. 25.

<sup>7</sup> *Texas Cent. R. Co. v. Andrews*, 28 Tex. Civ. App. 477, 67 S. W. 923.

<sup>8</sup> *Texas Cent. R. Co. v. Andrews*, 28 Tex. Civ. App. 477, 67 S. W. 923.

<sup>9</sup> *Hill v. Cunningham*, 25 Tex. 25.

<sup>10</sup> See the two preceding sections.

ing a fraud upon their attorneys.<sup>11</sup> The rule that courts look with favor upon a compromise and settlement made by the parties to a suit, to prevent the vexation and expense of further litigation, only applies where all the rights and interests of all of the parties concerned, both legal and equitable, have been respected and observed in good faith.<sup>12</sup> Where the parties negotiate a settlement for the purpose of defrauding the attorney in the collection of his fees, the court will grant such relief as the circumstances of the case may warrant. The usual practice is to set aside the dismissal, discontinuance, satisfaction, or other proceeding whereby the action has been disposed of.<sup>13</sup> In some jurisdictions the court will permit the attorney to continue the cause, in the name of his client, to determine and satisfy his claim.<sup>14</sup>

**§ 459. Settlement Provided for in Contract.** — In some instances the contract fixes the amount which the attorney is to receive in the event of a settlement, either with or without his consent, and, in such cases, the fee so stipulated must, of course, be paid on the settlement of the cause.<sup>15</sup> But the payment of a certain sum merely for the purpose of terminating the litigation and disposing of the annoyance caused by its prosecution, is not a "settlement or recovery."<sup>16</sup> So, where a creditor left a claim with

<sup>11</sup> *Potter v. Ajax Min. Co.*, 22 Utah 273, 61 Pac. 999.

<sup>12</sup> *Weeks v. Wayne Circuit Judges*, 73 Mich. 256, 41 N. W. 269. See also *Read v. Dupper*, 6 T. R. (Eng.) 361; *Louisville, etc., R. Co. v. Wilson*, 138 U. S. 507, 11 S. Ct. 405, 34 U. S. (L. ed.) 1025.

<sup>13</sup> *Bush v. Prescott, etc., R. Co.*, 83 Ark. 210, 103 S. W. 176; *Whitaker v. New York, etc., R. Co.*, 54 Super. Ct. 8, 3 N. Y. St. Rep. 537; *Potter v. Ajax Min. Co.*, 22 Utah 273, 61 Pac. 999.

But where a cause of action is assigned and then settled by the assignee, and the judgment in the action satisfied on settlement by the assignee, the satisfaction will not be

set aside at the instance of plaintiff's attorneys, employed by the assignor, the beneficial, though not the nominal, plaintiff, to permit them to enforce their claim for services, where their rights in collecting their compensation from the assignor were not prejudiced. *In re Goodale*, 58 Misc. 182, 108 N. Y. S. 949.

<sup>14</sup> *Potter v. Ajax Min. Co.*, 22 Utah 273, 61 Pac. 999.

<sup>15</sup> *Elliott v. Rubel*, 132 Ill. 9, 23 N. E. 400, reversing 30 Ill. App. 62. See also *Rickel v. Chicago, etc., R. Co.*, 112 Ia. 148, 83 N. W. 957. And see *supra*, § 439.

<sup>16</sup> *Randel v. Vanderbilt*, 75 App. Div. 313, 78 N. Y. S. 124, *affirmed* 180 N. Y. 547, 73 N. E. 1131.

a lawyer for collection, and, among other things, agreed that, in case he should himself "settle, compromise, or receive, or in any way dispose of, the claim," the attorney should be allowed twenty-five per cent. it was held that the mere taking by the creditor of the debtor's note, without security or payment, did not entitle the attorney to his commission.<sup>17</sup>

**§ 460. Liability of Adverse Party.** — The mere fact that the client and his opponent adjust their differences without the consent of counsel does not, as a general rule, impose any liability on the adverse party for the payment of his opponent's counsel fees.<sup>18</sup> The defendant will be liable, however, where he agrees to pay such fees as a part of the settlement; and such liability may be enforced against him.<sup>19</sup> Such an agreement, though, will not exonerate the client.<sup>20</sup> In some jurisdictions the attorney may intervene in the suit and continue it for his own protection,<sup>1</sup> but, in such cases, it seems that the attorney must establish the original cause of action.<sup>2</sup> In Arkansas it is provided by statute that in the event of the compromise of a suit after the same has been filed, where the fees of the attorney for the plaintiff or the defendant are contingent, the attorney for the party receiving a consideration for the compromise shall be entitled to sue both the plaintiff and the defendant for a reasonable fee to be fixed by the court or jury trying the case.<sup>3</sup> So, also, the adverse party will be liable for his opponent's counsel fees where, under the local law, such counsel

<sup>17</sup> *Mills v. Fox*, 4 E. D. Smith (N. Y.) 220.

<sup>18</sup> *Crossman v. Smith*, 116 App. Div. 791, 102 N. Y. S. 18.

<sup>19</sup> *Boyd v. G. W. Chase, etc.*, Mercantile Co., 135 Mo. App. 115, 115 S. W. 1052; *Pilkington v. Brooklyn Heights R. Co.*, 49 App. Div. 22, 63 N. Y. S. 211; *Nen v. Brooklyn Heights R. Co.*, 113 App. Div. 446, 99 N. Y. S. 290.

<sup>20</sup> *Safford v. Carroll*, 23 La. Ann. 382.

<sup>1</sup> *Galveston, etc., R. Co. v. Ginther*,

96 Tex. 295, 72 S. W. 166, *affirming* 30 Tex. Civ. App. 161, 70 S. W. 96; *Texas Cent. R. Co. v. Andrews*, 28 Tex. Civ. App. 477, 67 S. W. 923; *Potter v. Ajax Min. Co.*, 22 Utah 273, 61 Pac. 999.

<sup>2</sup> *Swift v. Register*, 97 Ga. 446, 25 S. E. 315; *Merchants' Nat. Bank v. Eustis*, 8 Tex. Civ. App. 350, 28 S. W. 227; *Wilbur v. Lane*, 53 Tex. Civ. App. 249, 115 S. W. 298; *Lynch v. Munson*, (Tex.) 59 S. W. 603.

<sup>3</sup> *Bush v. Prescott, etc., R. Co.*, 83 Ark. 210, 103 S. W. 176.

is entitled to a lien for his fees; <sup>4</sup> this subject will be considered more fully in connection with the general treatment of attorney's liens. <sup>5</sup>

*On Appointment to Serve Poor Persons.*

§ 461. **In General.**—Consideration has been given heretofore to the power of the court to appoint counsel to serve indigent persons, <sup>6</sup> and to the right of counsel to compensation therefor, <sup>7</sup> and also to the right of attorneys to assist such persons in their litigation, without pay, irrespective of an appointment by the court. <sup>8</sup> This section, therefore, will be confined to a discussion of the amount of compensation allowed for the defense of indigent prisoners under statutory authority. Notwithstanding some early decisions to the contrary, <sup>9</sup> it is now well settled that the justification for allowing compensation for the defense of indigent prisoners must be found in the local statutes; the amount fixed by such statutes, therefore, govern the courts in this respect. <sup>10</sup> The usual provision, in such cases, is that the attorney shall be allowed a reasonable fee to be fixed by the court, not exceeding a sum specified. Such provisions have been declared to be constitutional. <sup>11</sup> An old Alabama statute allows counsel one half of the compensation allowed by law to solicitors. <sup>12</sup> The Colorado statute provides for an allowance of a counsel fee not to exceed twenty dollars in all cases where the defendant is indicted for a misdemeanor; in all cases of felony punished by imprisonment, the counsel fee is not to exceed thirty dollars; and in felonies punishable by death, the fee is not

<sup>4</sup> *Curtis v. Metropolitan St. R. Co.*, 125 Mo. App. 369, 102 S. W. 62, following *Curtis v. Metropolitan St. R. Co.*, 118 Mo. App. 341, 94 S. W. 762; *Boyle v. Metropolitan St. R. Co.*, 134 Mo. App. 71, 114 S. W. 558; *Boyd v. G. W. Chase, etc., Mercantile Co.*, 135 Mo. App. 115, 115 S. W. 1052; *Carter v. Chicago, etc., R. Co.*, 136 Mo. App. 719, 119 S. W. 35; *Hurr v. Metropolitan St. R. Co.*, 141 Mo. App. 217, 124 S. W. 1057; *Whittaker v. New York, etc., R. Co.*, 54 Super. Ct. 8, 3 N. Y. St. Rep. 537.

<sup>5</sup> See *infra*, §§ 640-645.

<sup>6</sup> See *supra*, §§ 86, 87.

<sup>7</sup> See *supra*, §§ 410-412.

<sup>8</sup> See *supra*, § 393.

<sup>9</sup> See *supra*, §§ 410, 411.

<sup>10</sup> See the codes and general laws of the various jurisdictions.

<sup>11</sup> *Samuels v. Dubuque County*, 13 Ia. 536.

<sup>12</sup> *Commissioners' Ct. v. Turner*, 45 Ala. 199.

As to the fees allowed to solicitors, see Ala. Code (1907), § 6633.

to exceed fifty dollars.<sup>13</sup> In Indiana reasonable compensation is allowed.<sup>14</sup> The Iowa code provides that an attorney appointed by the court to defend a person indicted for homicide, or any offense the punishment of which may be life imprisonment, shall receive a fee of twenty dollars per day for the time actually occupied in court in the trial. If the prosecution be for any other felony, he shall receive the sum of ten dollars in full for services.<sup>15</sup> In Maine, under statute, the court is authorized to allow reasonable compensation to counsel for the defense of indigent prisoners.<sup>16</sup> Under the Michigan statute the compensation allowed in any one case must not exceed the sum of fifty dollars.<sup>17</sup> And under the Nebraska criminal code the counsel fees must not exceed one hundred dollars excepting in homicide cases.<sup>18</sup> The Nevada statute fixes the attorney's compensation at a sum not to exceed fifty dollars.<sup>19</sup> The New York Code of Criminal Procedure provides that the court may allow counsel his personal and incidental expenses and also reasonable compensation, not exceeding the sum of five hundred dollars.<sup>20</sup> In Ohio counsel are entitled to such compensation as the court may approve in cases of murder in the first or second degree; in a case of manslaughter, not exceeding one hundred dollars, and in other cases of felony, not exceeding fifty dollars.<sup>1</sup> Under the Wisconsin statute the court is authorized to allow a reasonable compensation not to exceed fifteen dollars for each day actually occupied in the trial or proceeding.<sup>2</sup> In some jurisdictions, where several attorneys are appointed, each may be allowed

<sup>13</sup> Mills's Ann. Stat. (1891), § 1026.

<sup>14</sup> *Miami County v. Mowbray*, 160 Ind. 10, 66 N. E. 46.

<sup>15</sup> Iowa Ann. Code (1897), § 5314.

<sup>16</sup> Maine Rev. Stats. (1903), p. 970. See also Anonymous, 76 Me. 207.

<sup>17</sup> Michigan Comp. Laws (1897), § 12,018. See also *Withey v. Osceola Circuit Judge*, 108 Mich. 168, 65 N. W. 668.

<sup>18</sup> Neb. Comp. Stats. (1899), § 7162. See also *Boone County v. Armstrong*, 23 Neb. 764, 37 N. W. 626; *Edmonds v. State*, 43 Neb. 742, 62 N. W. 199.

<sup>19</sup> Act of March 5, 1875, p. 142 (*Cutting's Comp. Laws Ann.* 1861-1900), §§ 2455, 2456. See also *Washoe County v. Humboldt County*, 14 Nev. 123.

<sup>20</sup> N. Y. Code Crim. Pro., § 308. See also *People v. Barone*, 161 N. Y. 475, 55 N. E. 1091; *Matter of Monfort*, 78 App. Div. 567, 79 N. Y. S. 765.

<sup>1</sup> Gen. Code Ohio (1910), § 13,618.

<sup>2</sup> Wis. Stats. (1898), § 4713. See also *Green Lake County v. Waupaca County*, 113 Wis. 425, 89 N. W. 549.

a reasonable compensation for his services,<sup>3</sup> the total of which, however, must not exceed the statutory maximum.<sup>4</sup> So, where several defendants are indicted and tried jointly, it seems that but one counsel fee will be allowed;<sup>5</sup> but where the defendants are tried separately it has been held that a reasonable counsel fee may be allowed for each trial,<sup>6</sup> even though the aggregate amount thereof may exceed the statutory allowance.<sup>7</sup> Where more than one trial is necessary in any one case, it seems that the attorney may be al-

<sup>3</sup> *Gordon v. Dearborn County*, 52 Ind. 322; *People v. Heiselbetz*, 26 Misc. 100, 5 N. Y. Ann. Cas. 165, 13 N. Y. Crim. 470, 55 N. Y. S. 4.

<sup>4</sup> Anonymous, 76 Me. 207.

In *People v. Heiselbetz*, 30 App. Div. 199, 13 N. Y. Crim. 223, 51 N. Y. S. 685, it was said that "the real question is whether the legislature intended to limit the aggregate amount to be allowed to counsel; and I think it was the manifest intention of that body to limit it to the sum of five hundred dollars regardless of the number of counsel assigned, and also to allow the personal and incidental expenses of the counsel. The court may apportion the five hundred dollars between counsel, for the purpose of giving, not adequate compensation, but reasonable compensation within the limitation of the statute. It certainly was not in the contemplation of the legislature that an unlimited number of counsel could be assigned, and five hundred dollars set apart for each of them."

<sup>5</sup> Under the *Colorado statute*, which provides that "but one fee shall be allowed to counsel in any one case," it was held that, although there were three defendants, counsel was entitled to but one fee. *Washington County v. Murray*, 45 Colo. 115, 100 Pac. 588.

In *Maine*, it was held that where two or more persons are jointly indicted for a capital offense and, by order of the court, are tried jointly, and, on application therefor, the court assigns separate counsel for each, the presiding judge has authority, under the statute, to allow a sum not exceeding one hundred and fifty dollars in all for the services of counsel for any one trial, including services upon appeal or upon exceptions before the law court. Anonymous, 76 Me. 207.

Compare *Clark v. Osceola County*, 107 Ia. 502, 78 N. W. 198, wherein it was held that where an attorney was appointed to defend two prisoners, jointly indicted and tried, there were, in legal effect, two appointments, and that he was entitled to the statutory fee for each.

<sup>6</sup> Where two defendants, indicted for murder in the first degree and arraigned at the same time, demand and receive separate trials, an attorney who has been assigned as counsel for each, upon the request of each for such aid, may be allowed by the trial court compensation for his services to each defendant. *People v. McElvaney*, 36 Misc. 316, 10 N. Y. Ann. Cas. 316, 73 N. Y. S. 639.

<sup>7</sup> *People v. McElvaney*, 36 Misc. 316, 10 N. Y. Ann. Cas. 316, 73 N. Y. S. 639.

lowed the statutory compensation for each trial.<sup>8</sup> Under some statutes counsel appointed to defend indigent prisoners are entitled to additional compensation for services rendered in an appellate court to which the case has been taken for review.<sup>9</sup> Under the Wisconsin statute it has been held that an attorney appointed by the court to defend indigent persons accused of crime, are not entitled to compensation for the time spent out of court in prepa-

<sup>8</sup> *Tomlinson v. Monroe County*, 134 Ia. 608, 112 N. W. 100; *Washoe County v. Humboldt County*, 14 Nev. 123; *People v. Montgomery*, 101 App. Div. 338, 19 N. Y. Crim. 117, 91 N. Y. S. 765.

*The statutory limitation of the amount of counsel fees was intended to apply only to a single trial or a single appeal, and successive allowances may be granted upon successive trials by the court at different terms; each allowance, however, must be within the limitation prescribed by the statute.* *People v. Montgomery*, 101 App. Div. 338, 19 N. Y. Crim. 117, 91 N. Y. S. 765.

*Under the Nevada statute which provides for allowing an attorney appointed by the court to defend a prisoner "such fee as the court may fix, not to exceed fifty dollars," it has been held that where the attorney, after a trial of one case in one county, follows it to another county to which it is removed, and then to the supreme court, he is entitled to a separate fee, not exceeding fifty dollars, for each of the three trials.* *Washoe County v. Humboldt County*, 14 Nev. 123.

*Compare* *People v. Coler*, 61 App. Div. 538, 10 N. Y. Ann. Cas. 105, 15 N. Y. Crim. 160, 70 N. Y. S. 639, wherein it was held that where one accused of murder pleaded not guilty, and with a specification of insanity

thereto, counsel having been assigned by the court to defend him, and commissioners were appointed, who determined him insane, it was error to grant counsel an allowance of five hundred dollars, inasmuch as the proceeding of the commissioners formed no part of the trial, which, under sections 354, 355, must be by a jury, and such proceedings did not dispose of the action or indictment.

<sup>9</sup> *Baylies v. Polk County*, 58 Ia. 357, 12 N. W. 311; *State v. Behrens*, 109 Ia. 58, 79 N. W. 387; *Washoe County v. Humboldt County*, 14 Nev. 123; *People v. Barone*, 161 N. Y. 475, 14 N. Y. Crim. 378, 55 N. E. 1091; *People v. Ferraro*, 162 N. Y. 545, 57 N. E. 167.

*Under the Iowa statute which provides that an attorney, appointed to defend a poor person, need not follow the case into the supreme court, but, if he does, he shall receive an enlarged compensation on a scale corresponding to that fixed by the statute, it was held that an affidavit to the effect that the attorney "has not directly or indirectly received any compensation for such services from any source" must be filed with the court which made the appointment. The claim, however, should be presented to the board of supervisors for allowance.* *State v. Behrens*, 109 Ia. 58, 79 N. W. 387.



ration for trial.<sup>10</sup> In New York, however, the court may allow counsel his personal and incidental expenses on a verified statement thereof;<sup>11</sup> but the fees of associate counsel, retained by the attorney assigned to the defense of an indigent prisoner to aid him in gathering testimony, does not constitute "personal and incidental expenses," within the meaning of the code.<sup>12</sup>

*Under Bankruptcy Act.*

**§ 462. Allowance of Attorney Fees.** — The bankruptcy act provides that "the actual and necessary expenses incurred by officers in the administration of estates shall, except where other provisions are made for their payment, be reported in detail, under oath, and examined and approved or disapproved by the court. If approved, they shall be paid or allowed out of the estates in which they were incurred."<sup>13</sup> Under the provision counsel fees may be allowed by the referee in bankruptcy,<sup>14</sup> even without notice to creditors,<sup>15</sup> for such services as are beneficial to the estate.<sup>16</sup>

**§ 463. Fees of Bankrupt's Attorney.** — An attorney is entitled to reasonable compensation for services rendered in aiding the bankrupt to comply with the statutory requirements either in voluntary<sup>17</sup> or involuntary proceedings.<sup>18</sup> The statute does not,

<sup>10</sup> *Green Lake County v. Waupaca County*, 113 Wis. 425, 89 N. W. 549.

<sup>11</sup> *Matter of Monfort*, 78 App. Div. 567, 79 N. Y. S. 765.

<sup>12</sup> *Matter of Waldheimer*, 84 App. Div. 366, 17 N. Y. Crim. 381, 82 N. Y. S. 916.

<sup>13</sup> Bankr. Act, § 62, 30 Stat. 562; 1 Fed. Stat. Ann., p. 678 (Supp. 1912, p. 749).

<sup>14</sup> *In re Stotts*, 93 Fed. 438, 1 Am. Bankr. Rep. 641.

<sup>15</sup> *In re Stotts*, 93 Fed. 438, 1 Am. Bankr. Rep. 641.

<sup>16</sup> *In re Zier*, 142 Fed. 102, 73 C. C. A. 326, 15 Am. Bankr. Rep. 646, *affirming* 127 Fed. 399, 11 Am. Bankr.

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Rep. 527; *In re Claussen*, 164 Fed. 300, 21 Am. Bankr. Rep. 34.

<sup>17</sup> *In re Terrill*, 103 Fed. 781, 4 Am. Bankr. Rep. 625.

<sup>18</sup> *In re Michel*, 95 Fed. 803, 1 Am. Bankr. Rep. 665; *In re Woodard*, 95 Fed. 955, 2 Am. Bankr. Rep. 692; *In re Kross*, 96 Fed. 816, 3 Am. Bankr. Rep. 187; *In re Anderson*, 103 Fed. 854, 4 Am. Bankr. Rep. 640; *In re Rosenthal*, 120 Fed. 848, 9 Am. Bankr. Rep. 626; *In re Goldville Mfg. Co.*, 123 Fed. 579, 10 Am. Bankr. Rep. 552; *In re Payne*, 151 Fed. 1018, 18 Am. Bankr. Rep. 192; *Matter of Eshwege*, 8 Am. Bankr. Rep. 282; *Matter of Stratemeyer*, 14 Am. Bankr. Rep. 120.

however, authorize the allowance of fees for all legal work which the attorney may have done for the bankrupt, but only for that which was required by the provisions of the law and the necessities of the proceeding.<sup>19</sup> The statute relates only to services rendered after the bankruptcy proceedings are instituted, to aid the bankrupt in performing his duties required by such act, and not to services rendered prior to bankruptcy in order to obtain a composition of creditors.<sup>20</sup> And whether fees claimed by the attorney for the bankrupt are allowable depends upon whether the services rendered were for "cost of administration"—that is, whether as rendered they conduced to the benefit of the estate and its prompt administration.<sup>1</sup> As a general rule, the services for which the bankrupt's attorney may be paid out of the estate, as part of the costs of administration, are the preparation and filing of the petition and schedules, and the attendance upon the first meeting of the creditors.<sup>2</sup> The court may, however, allow counsel fees for services actually rendered in good faith for the purpose of impartially administering the estate,<sup>3</sup> especially where such services are beneficial; thus where, after the discharge of the bankrupt and his trustee, the attorney, as the result of considerable effort in examining records, etc., discovered additional assets amounting to a considerable sum, it was held that he should be allowed a fair remuneration for the services so rendered.<sup>4</sup> It has been held, however, as to claims of this character, that the attorney must submit his claim for compensation as a general debt of the estate.<sup>5</sup> No allowance can be made from the estate to attorneys for services rendered in the matter of the bankrupt's application for a discharge,<sup>6</sup> or for services on a contested application to confirm a composition,<sup>7</sup> or for

<sup>19</sup> *In re Terrill*, 103 Fed. 781, 4 Am. Bankr. Rep. 625; *In re Payne*, 151 Fed. 1018, 18 Am. Bankr. Rep. 192.

<sup>20</sup> *In re Stolp*, 199 Fed. 488; *In re Marble Products Co.*, 199 Fed. 668.

<sup>1</sup> *In re Duran Mercantile Co.*, 199 Fed. 961.

<sup>2</sup> *Matter of Meis*, 18 Am. Bankr. Rep. 104.

<sup>3</sup> *In re Rosenthal*, 120 Fed. 848, 9 Am. Bankr. Rep. 626.

<sup>4</sup> *In re Irwin*, 171 Fed. 284, 22 Am. Bankr. Rep. 165, *modifying* 174 Fed. 642, 98 C. C. A. 396.

<sup>5</sup> *In re Beek*, 92 Fed. 889, 1 Am. Bankr. Rep. 535.

<sup>6</sup> *In re Brundin*, 112 Fed. 306, 7 Am. Bankr. Rep. 296; *In re Gillardon*, 187 Fed. 289; *In re Duran Mercantile Co.*, 199 Fed. 961.

<sup>7</sup> *In re Fogarty*, 187 Fed. 773, 109 C. C. A. 621.

claiming the bankrupt's exemptions,<sup>8</sup> or for services which tend to defeat and delay the proceedings,<sup>9</sup> as, for instance, in resisting the adjudication.<sup>10</sup> So, where the attorney has been paid before the bankruptcy, whether by the bankrupt or another person, a sufficient compensation for his services, no further sum will be allowed out of the estate.<sup>11</sup>

### § 464. Fees of Attorneys for Trustee and Receiver.—

A trustee of a bankrupt, though an attorney, is not bound to perform legal services, and even if he does he cannot have compensation therefor from the estate.<sup>12</sup> But where he requires legal assistance he may employ counsel, and the reasonable fees of such counsel may be allowed as part of the cost of administering the estate.<sup>13</sup> Thus the fees of counsel employed by the trustee to recover assets of the estate, constitutes a part of the trustee's expenses;

<sup>8</sup> In re Castleberry, 143 Fed. 1018, 16 Am. Bankr. Rep. 159; In re O'Hara, 166 Fed. 384, 21 Am. Bankr. Rep. 508.

<sup>9</sup> In re Woodard, 95 Fed. 955, 2 Am. Bankr. Rep. 692; In re Zier, 142 Fed. 102, 73 C. C. A. 326.

<sup>10</sup> *Randolph v. Seruggs*, 190 U. S. 533, 23 S. Ct. 710, 47 U. S. (L. ed.) 1165, 10 Am. Bankr. Rep. 1.

<sup>11</sup> In re O'Connell, 98 Fed. 83, 3 Am. Bankr. Rep. 422; In re Smith, 108 Fed. 39, 5 Am. Bankr. Rep. 559.

<sup>12</sup> In re George Halbert Co., 134 Fed. 236, 67 C. C. A. 18, 13 Am. Bankr. Rep. 399; In re McKenna, 137 Fed. 611, 15 Am. Bankr. Rep. 4; In re Felson, 139 Fed. 275, 15 Am. Bankr. Rep. 185. See also In re Evans, 116 Fed. 909, 8 Am. Bankr. Rep. 730.

<sup>13</sup> In re Stotts, 93 Fed. 438, 1 Am. Bankr. Rep. 641; In re Burrus, 97 Fed. 926, 3 Am. Bankr. Rep. 296; In re Rude, 101 Fed. 805, 4 Am. Bankr. Rep. 319; In re Arnett, 112 Fed. 770, 7 Am. Bankr. Rep. 522; In re Lang,

127 Fed. 755, 11 Am. Bankr. Rep. 794; In re Byerly, 128 Fed. 637, 12 Am. Bankr. Rep. 186; In re Talton, 137 Fed. 178, 14 Am. Bankr. Rep. 617; In re McKenna, 137 Fed. 611, 15 Am. Bankr. Rep. 4; *Davidson v. Friedman*, 140 Fed. 853, 72 C. C. A. 553; In re Dimm, 146 Fed. 402, 17 Am. Bankr. Rep. 119; *Page v. Rogers*, 149 Fed. 194, 79 C. C. A. 153, 17 Am. Bankr. Rep. 854; In re Mitchell, 1 Am. Bankr. Rep. 687; In re Smith, 2 Am. Bankr. Rep. 648; In re Knight, 5 Am. Bankr. Rep. 560 note; *Matter of Burke*, 6 Am. Bankr. Rep. 502; *Keyes v. McKirrow*, 9 Am. Bankr. Rep. 322; *Matter of Niman*, 14 Am. Bankr. Rep. 515.

*While the fact that an attorney had acted for the bankrupt may effect the propriety of his employment to act for the trustee, it does not deprive him of the right to compensation for services after he has been so employed.* In re Dimm, 146 Fed. 402, 17 Am. Bankr. Rep. 119.

and, as such, a part of the costs and expenses of administration.<sup>14</sup> But where the trustee's attorney assumes a position antagonistic to the creditors, as, for instance, where he acts in favor of the bankrupt, he will be allowed only a nominal sum.<sup>15</sup> A receiver in bankruptcy is entitled to be reimbursed for the fees of counsel only to the extent that the services rendered by such counsel were for the direct benefit of the estate.<sup>16</sup> Ordinarily, the duties of a statutory receiver for an alleged bankrupt neither require nor justify the employment of an attorney; and hence, a claim for the services of an attorney so employed is not chargeable *per se* against the estate where it is predicated alone on the fact of employment and service rendered.<sup>17</sup>

**§ 465. Fees of Attorneys for Creditors.** — The statute allows "one reasonable attorney's fee, for the professional services actually rendered, irrespective of the number of attorneys employed, to the petitioning creditors in involuntary cases."<sup>18</sup> The

<sup>14</sup> Davidson v. Friedman, 140 Fed. 853, 72 C. C. A. 553; Page v. Rogers, 149 Fed. 194, 79 C. C. A. 153, 17 Am. Bankr. Rep. 854.

*Claimant Cannot be Compelled to Pay Trustee's Attorney.*—Where, on re-examination of the allowance of certain claims against a bankrupt's estate, it was found on sufficient evidence that the claims were unsustainable, it was held that while the referee properly required the claimant to pay the costs of the hearing, he was not authorized to require that the claimant also pay an attorney's fee to the trustee's attorney. In re Rome, 162 Fed. 971, 19 Am. Bankr. Rep. 820.

<sup>15</sup> In re Fidler, 172 Fed. 632, 23 Am. Bankr. Rep. 16.

<sup>16</sup> In re Zier, 142 Fed. 102, 73 C. C. A. 326, 15 Am. Bankr. Rep. 646; In re Oppenheimer, 116 Fed. 140, 17

Am. Bankr. Rep. 59; In re Ketterer Mfg. Co., 155 Fed. 987, 19 Am. Bankr. Rep. 646; In re Ketterer Mfg. Co., 156 Fed. 719; In re T. E. Hill Co., 159 Fed. 73, 86 C. C. A. 263, 20 Am. Bankr. Rep. 73.

*Services Not Beneficial.*—An attorney is not entitled to an allowance from the estate in bankruptcy on account of services rendered to a state receiver where, as a whole, his services cost the estate and general creditors several times its amount, in increased expenses of administration. In re Zier, 127 Fed. 399, 11 Am. Bankr. Rep. 527. See also Frank v. Dickey, 139 Fed. 744, 71 C. C. A. 562, 15 Am. Bankr. Rep. 155.

<sup>17</sup> In re T. E. Hill Co., 159 Fed. 73, 86 C. C. A. 263, 20 Am. Bankr. Rep. 73.

<sup>18</sup> Bankr. Act, § 64b (3); 30 Stat. L. 563, 1 Fed. Stat. Ann. 683 (Supp.

“one attorney’s fee” thus allowed should be equitably divided between attorneys representing two petitions which are filed and consolidated by order of the court.<sup>19</sup> But the unnecessary filing of a second petition on behalf of creditors who did not join in the first one, does not entitle the attorney for such creditors to a fee for his services; and this is true even though the first petition is demurrable, where it is subsequently amended and an adjudication made thereon.<sup>20</sup> Nor are attorneys who filed a petition in involuntary bankruptcy for creditors, which was defective and insufficient to warrant an adjudication, which was made on a second petition by other creditors, entitled to an allowance of fees from the estate.<sup>1</sup> The statute also provides that “where property of the bankrupt, transferred or concealed by him either before or after the filing of the petition, shall have been recovered for the benefit of the estate of the bankrupt by the efforts and at the expense of one or more creditors, the reasonable expenses of such recovery” shall be entitled to payment out of the bankrupt estate.<sup>2</sup> The theory upon which the bankruptcy law authorizes the allowance of fees to the attorneys for petitioning creditors is that such creditors are acting for the joint benefit of themselves and all other unsecured creditors who will, by reason of their efforts, share equally with them in the unincumbered assets of the bankrupt.<sup>3</sup> Thus where one of the creditors of a bankrupt, by his attorney, objects to the allowance of a claim filed by another creditor, the trustee declining to interfere, and upon a contest and trial secures its rejection, thereby saving a

1912, p. 772. See also *In re Young*, 142 Fed. 891, 16 Am. Bankr. Rep. 106.

<sup>19</sup> *In re McCracken*, 129 Fed. 621, 12 Am. Bankr. Rep. 95; *In re Coney Island Lumber Co.*, 199 Fed. 197.

<sup>20</sup> *Frank v. Dickey*, 139 Fed. 744, 71 C. C. A. 562, 15 Am. Bankr. Rep. 155.

<sup>1</sup> *In re Fischer*, 175 Fed. 531, 99 C. C. A. 153, 23 Am. Bankr. Rep. 427.

Thus where two petitions in involuntary bankruptcy were filed by different creditors against a corporation, the first of which did not present

grounds upon which it could legally be adjudged a bankrupt, and the adjudication was made on grounds alleged in the other, the attorneys in the subsequent petition are entitled to the fee allowed for filing the petition and procuring the adjudication. *In re Southern Steel Co.*, 169 Fed. 702, 22 Am. Bankr. Rep. 476.

<sup>2</sup> Bankr. Act, § 64b (2), 32 Stat. L. 800, Fed. Stat. Ann. Supp. 1912, p. 771. See also *In re Hersey*, 171 Fed. 1004, 22 Am. Bankr. Rep. 863. And see *infra*, § 467.

<sup>3</sup> *In re Gillaspie*, 190 Fed. 88.

considerable sum for distribution among the creditors generally, the attorney for such contesting creditor may be allowed a fee to be paid out of the estate.<sup>4</sup> Where the property of a bankrupt was turned over to voluntary trustees as agents for creditors in an attempt to administer the assets without resort to bankruptcy proceedings, such trustees, in accounting to the trustee in bankruptcy, were entitled to have their attorney's fees allowed, if proper in amount.<sup>5</sup> The statute does not allow, as a claim against the estate, compensation for the services of attorneys employed by creditors in their own interest.<sup>6</sup> Attorneys so employed must look to their clients, not to the bankrupt estate, or to the court, for compensation.<sup>7</sup> Neither under the statutory provisions, nor its general equity powers, has the court authority to make an allowance for attorney's services rendered in securing the rejection of improper claims, setting aside alleged priorities, or securing the appointment of a proper trustee.<sup>8</sup> But where the defendant, in an action by a trustee in bankruptcy, answered that he had in his hands a sum belonging to the bankrupt, but which was claimed as assignee by his wife, who thereupon intervened, and the only issue tried was between her and the plaintiff, it was held that the defendant, who occupied the position of a mere stakeholder, was entitled to the allowance of a reasonable attorney's fee.<sup>9</sup> In some instances, however, creditors attorneys' fees have been allowed indirectly; thus where an obligation, by which a bankrupt's indebtedness is evidenced, contains a stipulation for an attorney's fee for the col-

<sup>4</sup> *In re Little River Lumber Co.*, 101 Fed. 558, 3 Am. Bankr. Rep. 682.

<sup>5</sup> *In re Marble Products Co.*, 199 Fed. 668.

<sup>6</sup> *In re Silverman*, 97 Fed. 325, 3 Am. Bankr. Rep. 227; *In re Smith*, 108 Fed. 39, 5 Am. Bankr. Rep. 559; *In re Watkinson*, 130 Fed. 218, 12 Am. Bankr. Rep. 370; *In re Worth*, 130 Fed. 927, 12 Am. Bankr. Rep. 566; *In re Felson*, 139 Fed. 275, 15 Am. Bankr. Rep. 185; *In re Coventry Evans Furniture Co.*, 171 Fed. 673, 22 Am. Bankr. Rep. 623; *In re Hersey*, 171 Fed. 1004, 22 Am. Bankr. Rep.

863; *In re Allert*, 173 Fed. 691, 23 Am. Bankr. Rep. 101; *In re Stewart*, 178 Fed. 463; *Matter of Fletcher*, 10 Am. Bankr. Rep. 398.

<sup>7</sup> *In re Evans*, 116 Fed. 909, 8 Am. Bankr. Rep. 730.

<sup>8</sup> *In re Coventry Evans Furniture Co.*, 171 Fed. 673, 22 Am. Bankr. Rep. 623; *In re Stewart*, 178 Fed. 463; *In re Madina Quarry Co.*, 191 Fed. 815, *reversing* 182 Fed. 508, 112 C. C. A. 329.

<sup>9</sup> *Caten v. Eagle Bldg., etc., Assoc.*, 177 Fed. 996, 23 Am. Bankr. Rep. 130.

lection thereof, and the claim has been placed with an attorney for collection prior to bankruptcy, and collection proceedings were actually instituted, so that the attorney's fee was a fixed liability at the time of the filing of the petition in bankruptcy, such fee constitutes a provable debt against the estate of the bankrupt, and, as such, is recoverable.<sup>10</sup> Where, however, the obligation has not been given to an attorney to collect, or no effort has been made to realize thereon such as would authorize the collection of the fee as part of the claim, the stipulated fee, in such cases, has not become such a fixed liability as to make it available as a provable debt in bankruptcy.<sup>11</sup> Where judgments were entered against a bankrupt by confession, without suit, and included an allowance for attorney's fees, it was held that the bankrupt was entitled at the first opportunity, when such judgments were presented for allowance as claims against his estate, to object to the allowance of the attorney's fees because no testimony was offered as to the value of the services or the amount of the commissions which should be allowed, and his trustee in bankruptcy was entitled to raise the same objection.<sup>12</sup>

**§ 466. Fees Must Be Reasonable in All Cases.** — Allowances to attorneys for services in bankruptcy cases must be made

<sup>10</sup> *Merchants' Bank v. Thomas*, 121 Fed. 306, 57 C. C. A. 374, 10 Am. Bankr. Rep. 299; *In re Edens Co.*, 151 Fed. 940, 18 Am. Bankr. Rep. 643; *In re V. & M. Lumber Co.*, 182 Fed. 231; *In re Torehia*, 185 Fed. 576. See also *In re Wendel*, 152 Fed. 672, 18 Am. Bankr. Rep. 665; *In re Ferreri*, 188 Fed. 675.

<sup>11</sup> *In re Roche*, 101 Fed. 956, 42 C. C. A. 115, 4 Am. Bankr. Rep. 369; *In re Garlington*, 115 Fed. 999, 8 Am. Bankr. Rep. 602; *In re Keeton*, 126 Fed. 426, 11 Am. Bankr. Rep. 367; *In re Keeton*, 126 Fed. 429, 11 Am. Bankr. Rep. 370; *In re Gebhard*, 140 Fed. 571, 15 Am. Bankr. Rep. 381; *In re T. H. Thompson Milling Co.*,

144 Fed. 314, 16 Am. Bankr. Rep. 454; *McCabe v. Patton*, 174 Fed. 217, 98 C. C. A. 225, 23 Am. Bankr. Rep. 335; *In re V. & M. Lumber Co.*, 182 Fed. 231.

But in *In re Ferreri*, 188 Fed. 675, it was held that where a mortgage executed by a bankrupt provided for the payment of the attorney's fees of the mortgagee in case he was required to employ counsel, it was held that the mortgagee was entitled to an allowance for a reasonable attorney's fee for services required in proving his claim and lien against the bankrupt's estate.

<sup>12</sup> *In re Torehia*, 185 Fed. 576.

in view of the clearly disclosed policy of the law to reduce the expense of administering bankrupt estates to the minimum.<sup>13</sup> The amount of such allowances is largely within the judicial discretion of the bankruptcy court,<sup>14</sup> subject to revision for abuse.<sup>15</sup> The referee in bankruptcy is entitled, and it is his duty, to reduce the amount named for attorney fees if he believes it to be too high.<sup>16</sup> While the amount should never be lavish or extravagant, and should always be rigidly scrutinized, it should be reasonable and adequate.<sup>17</sup> It is recognized in bankruptcy, as elsewhere, that it would be unwise, both for creditors and bankrupts, to make the compensation so parsimonious that attorneys of standing and experience would be reluctant to act. The amount of the estate, the complexity of the bankrupt's affairs, the time reasonably devoted to the service, and the standing and experience of counsel, are all proper elements to be taken into consideration in estimating the reasonableness of the fees;<sup>18</sup> and where the services have been important and beneficial to the estate, a liberal compensation should be allowed.<sup>19</sup>

§ 467. **Priority Rights.** — The debts to which the bankruptcy act accords priority of payment are (1) the "one reasonable attorney's fee"<sup>20</sup> allowed to the attorneys for petitioning creditors in involuntary proceedings,<sup>1</sup> and to the bankrupt in involuntary cases while performing the duties prescribed by the act, and, in voluntary cases, as the court may allow;<sup>2</sup> and (2) the reasonable expenses of creditors in recovering property for the benefit of the

<sup>13</sup> In re Lang, 127 Fed. 755, 11 Am. Bankr. Rep. 794; In re Christianson, 175 Fed. 867, 23 Am. Bankr. Rep. 710.

<sup>14</sup> In re Carr, 116 Fed. 556, 8 Am. Bankr. Rep. 635; In re Standard Fuller's Earth Co., 186 Fed. 578.

<sup>15</sup> In re Christianson, 175 Fed. 867, 23 Am. Bankr. Rep. 710.

<sup>16</sup> In re Carr, 116 Fed. 556, 8 Am. Bankr. Rep. 635; In re Ferreri, 188 Fed. 675.

<sup>17</sup> In re Sully, 142 Fed. 895, 15 Am. Bankr. Rep. 394; Matter of Berkowitz, 22 Am. Bankr. Rep. 236.

<sup>18</sup> In re Christianson, 175 Fed. 867, 23 Am. Bankr. Rep. 710.

<sup>19</sup> Matter of Berkowitz, 22 Am. Bankr. Rep. 236.

<sup>20</sup> Bankr. Act, § 64b (3), 30 Stat. L. 563, 1 Fed. Stat. Ann. 683 (Supp. 1912, p. 772).

<sup>1</sup> See *supra*, § 465.

<sup>2</sup> See *supra*, § 463. See also In re Kross, 96 Fed. 816, 3 Am. Bankr. Rep. 187; Matter of Hitchcock, 17 Am. Bankr. Rep. 664.



estate,<sup>3</sup> including the fees of counsel whose services were necessary for that purpose.<sup>4</sup> Attorney's fees earned otherwise are not entitled to priority under the bankruptcy act;<sup>5</sup> but it will be observed that the fees of the attorneys for the trustee and the receiver, being allowed as a part of the administrative expenses of these officers, are, in effect, also accorded priority rights.<sup>6</sup> Such claims for attorney's fees as are entitled to priority, rank next after the wages of laborers, and take precedence, subject to tax claims, of all liens on the funds in the hands of the court for distribution.<sup>7</sup>

**§ 468. Re-examination of Fees Paid in Contemplation of Bankruptcy.** — The bankruptcy act provides: "If a debtor shall, directly or indirectly, in contemplation of the filing of a petition by or against him, pay money or transfer property to an attorney and counselor at law, solicitor in equity, or proctor in admiralty for services to be rendered, the transaction shall be re-examined by the court on petition of the trustee or any creditor, and shall only be held valid to the extent of a reasonable amount to be determined by the court, and the excess may be recovered by the trustee for the benefit of the estate."<sup>8</sup> This section recognizes the right of a debtor to have the aid and advice of counsel, and, in

<sup>3</sup> Bankr. Act, § 64b (2), 32 Stat. L. 800, Fed. Stat. Ann. Supp. 1912, p. 771.

<sup>4</sup> See *infra*, § 465.

<sup>5</sup> In re Woodard, 95 Fed. 955, 2 Am. Bankr. Rep. 692; In re Lewin, 103 Fed. 850, 4 Am. Bankr. Rep. 632; In re Carr, 117 Fed. 574, 9 Am. Bankr. Rep. 58; In re Connell, 120 Fed. 846, 9 Am. Bankr. Rep. 474; In re Rosenthal, 120 Fed. 848, 9 Am. Bankr. Rep. 626; Frank v. Diekey, 139 Fed. 744, 71 C. C. A. 562, 15 Am. Bankr. Rep. 155; In re Zier, 142 Fed. 102, 73 C. C. A. 326, *affirming* 127 Fed. 399, 11 Am. Bankr. Rep. 527; In re O'Hara, 166 Fed. 384, 21 Am. Bankr. Rep. 508; In re Crave, etc., Co., 183 Fed. 769, 106 C. C. A. 180.

<sup>6</sup> See *supra*, § 464.

<sup>7</sup> In re Erie Lumber Co., 150 Fed. 817, 17 Am. Bankr. Rep. 689.

*Time of Presenting Claim.*—The claim of the bankrupt's attorney for a fee, payable as part of the costs of administration, does not lose its right to priority of payment out of the funds on hand at the time it is presented, merely because it was not presented until after the declaration and payment of a first dividend. In re Scott, 96 Fed. 607, 2 Am. Bankr. Rep. 324.

<sup>8</sup> Bankr. Act, § 60d; 30 Stat. L. 562; 1 Fed. Stat. Ann. p. 677 (Supp. 1912, p. 747).

contemplation of bankruptcy proceedings which shall strip him of his property, to make provision for the reasonable compensation of such counsel; it also recognizes the temptation of a failing debtor to deal too liberally with his property in employing counsel to protect him in the event of financial reverses and probable failure; and, in view of these circumstances, makes provision that the bankruptcy court administering the estate may, if the trustee or any creditor question the transaction, re-examine it with a view to a determination of its reasonableness.<sup>9</sup> The statute does not, however, prevent the debtor from paying his attorney a fair remuneration for his services, and it is immaterial whether the payment is made at, or after, the time of entering into the professional engagement.<sup>10</sup> A payment or transfer to counsel is valid to the extent that it is reasonable.<sup>11</sup> The statutory provision is limited, however, to the allowance of reasonable compensation to attorneys for services rendered to the bankrupt prior to and in contemplation of the commencement of the bankruptcy proceedings; it does not cover services rendered in resisting the creditor's petition for an adjudication of bankruptcy.<sup>12</sup> So, a payment made by a bankrupt to his attorney immediately prior to bankruptcy, for services previously rendered, in so far as the question of its being preferential is concerned, stands upon the same ground as a payment to any other creditor.<sup>13</sup> The jurisdiction of the bankruptcy court extends to a case where the counsel concerned are nonresidents of the state and district, and even where the transaction occurred, and notice of the proceeding was served, outside the district.<sup>14</sup> A

<sup>9</sup> *In re Wood*, 210 U. S. 246, 28 S. Ct. 621, 52 U. S. (L. ed.) 1046, 20 Am. Bankr. Rep. 1. And see to the same effect *In re Kross*, 96 Fed. 816, 3 Am. Bankr. Rep. 187; *In re Lewin*, 103 Fed. 850, 4 Am. Bankr. Rep. 632; *Pratt v. Bothe*, 130 Fed. 670, 65 C. C. A. 48, 12 Am. Bankr. Rep. 529; *In re Habegger*, 139 Fed. 623, 3 Am. Cas. 276, 71 C. C. A. 607, 15 Am. Bankr. Rep. 198; *In re Shiebler*, 163 Fed. 545, 20 Am. Bankr. Rep. 777; *Furth v. Stahl*, 205 Pa. St. 439, 55 Atl. 29, 10 Am. Bankr. Rep. 412.

<sup>10</sup> *In re Cummins*, 196 Fed. 224. See also *Maybin v. Raymond*, 15 Nat. Bankr. Reg. 353, 16 Fed. Cas. No. 9,338, and *Reed v. Mellor*, 5 Mo. App. 567, decided under earlier statutes.

<sup>11</sup> *In re Wood*, 210 U. S. 246, 28 S. Ct. 621, 52 U. S. (L. ed.) 1036, 20 Am. Bankr. Rep. 1.

<sup>12</sup> *Pratt v. Bothe*, 130 Fed. 670, 65 C. C. A. 48, 12 Am. Bankr. Rep. 529.

<sup>13</sup> *In re Shiebler*, 163 Fed. 545, 20 Am. Bankr. Rep. 777. And see *In re Stolp*, 199 Fed. 488.

<sup>14</sup> *In re Wood*, 210 U. S. 246, 28 S.

state court has no jurisdiction in this respect.<sup>15</sup> Proceedings to test the propriety and reasonableness of payments to an attorney for services rendered before the payment, as well as those to be rendered in the bankruptcy proceeding itself, may be taken in the bankruptcy court in the form of a motion to fix the allowance, and for an order directing the return of the balance.<sup>16</sup> Such notice, by mail or otherwise, as the court shall direct, of the proceeding so taken, is sufficient, provided the attorney is given an opportunity to appear and contest the motion.<sup>17</sup> These proceedings do not infringe the constitutional right of trial by jury.<sup>18</sup>

### *Apportionment of Fees.*

§ 469. **Generally.** — Attorneys who jointly undertake to defend a lawsuit are, for all practical purposes at least, special or limited partners in respect to the matter so undertaken,<sup>19</sup> and, in the absence of any agreement to the contrary, they are entitled to share equally in the compensation.<sup>20</sup> Neither can charge the other for extra services,<sup>1</sup> and mere neglect by one of them to discharge his duties will not be an abandonment of the contract, nor extin-

Ct. 621, 52 U. S. (L. ed.) 1046, 20 Am. Bankr. Rep. 1.

*Ancillary Jurisdiction.* — It has been held that a trustee in bankruptcy cannot maintain a plenary suit in a court of bankruptcy to recover, in another jurisdiction, excessive payments or transfers to counsel made by a bankrupt, in contemplation of bankruptcy proceedings, for services to be rendered, where that court has made no order in the proceeding authorized by section 60d to re-examine and reduce such payments or transfers. *In re Wood*, 210 U. S. 246, 28 S. Ct. 621, 52 U. S. (L. ed.) 1046, 20 Am. Bankr. Rep. 1.

But see section 2 (20) of the bankruptcy act (Fed. Stat. Ann. Supp. 1912, p. 480), which was added by the amendment of 1910, providing for

the exercise of ancillary jurisdiction.

<sup>15</sup> *In re Wood*, 210 U. S. 246, 28 S. Ct. 621, 52 U. S. (L. ed.) 1046, 20 Am. Bankr. Rep. 1; *Swartz v. Frank*, 183 Mo. 439, 82 S. W. 60.

<sup>16</sup> *In re Shiebler*, 163 Fed. 545, 20 Am. Bankr. Rep. 777.

<sup>17</sup> *In re Wood*, 210 U. S. 246, 28 S. Ct. 621, 52 U. S. (L. ed.) 1046, 20 Am. Bankr. Rep. 1.

<sup>18</sup> *In re Wood*, 210 U. S. 246, 28 S. Ct. 621, 52 U. S. (L. ed.) 1046, 20 Am. Bankr. Rep. 1.

<sup>19</sup> *Henry v. Bassett*, 75 Mo. 89; *Senneff v. Healy*, (Ia.) 135 N. W. 27.

<sup>20</sup> *Senneff v. Healy*, (Ia.) 135 N. W. 27; *Henry v. Bassett*, 75 Mo. 89. See also *Hurst v. Durnell*, 1 Wash. 438, 12 Fed. Cas. No. 6,928; *Matter of Lockman*, 4 Abb. N. Cas. (N. Y.) 173.

<sup>1</sup> *Henry v. Bassett*, 75 Mo. 89.

guish his claim to the proceeds.<sup>2</sup> Thus where the heirs of a decedent agreed in writing to the employment of two attorneys, to whom the management of litigation in which the estate was involved should be given, and who were to receive for their services twenty-five per cent of the amount realized for the estate, and one of the attorneys selected declined to act, and another attorney was employed by the heirs with the knowledge of the administrator to assist in the litigation, and, although the attorney thus retained acted in conjunction with the first attorney, he had no knowledge of the agreement for compensation until after the litigation was finished, it was held that an allowance of twelve and one-half per cent to each attorney was correct.<sup>3</sup> Where, however, two or more attorneys are severally employed by one litigant they are not partners in any sense, nor should their compensation be apportioned on a partnership basis.<sup>4</sup> Each of such attorneys may contract for his compensation independently of the other;<sup>5</sup> and, in the absence of such a contract, each is entitled to the reasonable value of his individual services,<sup>6</sup> and not to one-half of the value for the services of both attorneys.<sup>7</sup> Thus in an action by one of several attorneys for fees for professional services rendered in a case in which he stood on an equal footing with the other attorneys, and did such work as was necessary to be done by him, the court will not undertake to accurately separate the services performed by each counsel, but will determine from all the facts and circumstances what is the fair value of the services sued for.<sup>8</sup> So, a statute

<sup>2</sup> *Henry v. Bassett*, 75 Mo. 89. But see *Johnson v. Bright*, 15 Ill. 464.

<sup>3</sup> *In re McGee*, 205 Pa. St. 590, 55 Atl. 776.

<sup>4</sup> *Glidden v. Cowen*, 123 Fed. 48, 59 C. C. A. 172, wherein it was said: "This was the common case of the employment of several counsel, not otherwise associated, in a case without any agreement except that implied to pay them each such sum as their services should reasonably deserve. The master was clearly in error in adopting the theory proposed to him that those counselors should

be treated as partners, and therefore entitled to share equally in a gross sum to be awarded to the partnership—an error which may have seriously disturbed in the sequel the proportionate sums which are to be allowed to counsel."

<sup>5</sup> See *supra*, § 444.

<sup>6</sup> *MacDonald v. Tittmann*, 96 Mo. App. 536, 70 S. W. 502.

<sup>7</sup> *MacDonald v. Tittmann*, 96 Mo. App. 536, 70 S. W. 502.

<sup>8</sup> *Eakin v. Peoples Hotel Co.*, (Tenn.) 54 S. W. 87.

which permits the apportionment of solicitor's fees among those interested in certain cases applies only to amicable proceedings, not to suits where parties employ counsel to protect their special adverse interests.<sup>9</sup>

**§ 470. Under Agreement for Division of Fees.**—While an attorney has no implied power to retain associate counsel at his client's expense,<sup>10</sup> he may, at least in the absence of objection by the client, employ such aid on his own responsibility, and may agree with the counsel so employed as to a division of the fees. Agreements of this character, being neither contrary to public policy nor good morals,<sup>11</sup> may be enforced by action,<sup>12</sup> though not by summary proceedings.<sup>13</sup> Thus where an attorney contracted with the heirs of certain lands, adversely held, to proceed for the recovery thereof at his own expense in consideration of a certain interest therein, and, during the litigation, assigned part of his interest to attorneys and others assisting him, and, after the property was recovered, it was sold in partition proceedings, and was bought and conveyed to a trustee for the mutual benefit of the heirs, their attorneys and others, it was held that this was a conclusive recognition of the interests of the attorney and his assignees, and that the heirs were estopped from questioning the validity of the original contract.<sup>14</sup> Where a warrant was issued by a county to an attorney for services performed under a contract made by him and another attorney, and the latter procured an injunction designed to annul and cancel the warrant, and, in order to obtain the benefit of the warrant, the attorney to whom it was issued was compelled to defend the injunction suits and expend money in the defense thereof, it was held that the expenditures made in the injunction suit should have been allowed against the attorney who instituted

<sup>9</sup> *Cowdrey v. Hitchcock*, 103 Ill. 262.

<sup>10</sup> See *supra*, § 210.

<sup>11</sup> *White v. Polhamus*, 1 N. Y. City Ct. 421.

<sup>12</sup> *Chester v. Jumel*, 125 N. Y. 237, 26 N. E. 297, *reversing* 53 Hun 629

*mem.*, 5 N. Y. S. 809; *Aycock v. Baker*, (Tex.) 60 S. W. 273.

<sup>13</sup> See *supra*, § 357. See also *Haygood v. Haden*, 119 Ga. 463, 46 S. E. 625.

<sup>14</sup> *Chester v. Jumel*, 125 N. Y. 237, 26 N. E. 297.

the proceeding.<sup>15</sup> But the fact that a lawyer has an agreement with another person (not a lawyer) to render professional services for a third person, the attorney and his employer to share in the recovery, does not obligate the attorney to account to such employer for fees received from a different client for services rendered in connection with the same subject-matter.<sup>16</sup> So, while contracts made by an attorney with Indians must, in certain instances, be approved by the commissioner of Indian affairs and the secretary of the interior,<sup>17</sup> these requirements do not prohibit the approved contractors from employing others to assist them afterwards, or from making contracts pledging a part of their prospective compensation, provided such agreements do not amount to an assignment of the original contract and the substitution of other contractors.<sup>18</sup> In the absence of statutory authority, however, it seems that such agreements will not be enforced in the United States Court of Claims.<sup>19</sup>

### *Compensation of Law Partnerships.*

§ 471. **Generally.** — It is well settled that attorneys may enter into partnership relations,<sup>20</sup> and, as such, are entitled to compensation for services rendered the same as individual practitioners.<sup>1</sup> The proportion in which the members shall share in the

<sup>15</sup> *Henry v. Bassett*, 22 Mo. App. 667.

<sup>16</sup> *Casserleigh v. Green*, 12 Colo. App. 515, 56 Pac. 189, *affirmed* 28 Colo. 392, 65 Pac. 32.

<sup>17</sup> See section 2103 and 2106 U. S. Fed. Stat.; 3 Fed. St. Ann. pp. 367, 370. See also *supra*, § 418.

*The Indians are the wards of the United States*, and the supervision of their affairs and the protection of their interests have been confided to the secretary of the interior. In view of this relation it was eminently proper to require all contracts made with the Indians touching their lands and treaty claims, to be made subject to the approval of the commis-

sioner of Indian affairs and the secretary of the interior in order to prevent the taking of undue advantage of their ignorance and improvidence. *Gordon v. Gwydir*, 34 App. Cas. (D. C.) 508.

<sup>18</sup> *Gordon v. Gwydir*, 34 App. Cas. (D. C.) 508. See also *Owen v. Dudley*, 217 U. S. 488, 30 S. Ct. 602, 54 U. S. (L. ed.) 851, *affirming* 31 App. Cas. (D. C.) 177; *Maddux v. Bottineau*, 34 App. Cas. (D. C.) 119; *Robertson v. Gordon*, 34 App. Cas. (D. C.) 539.

<sup>19</sup> *Beddo v. U. S.*, 28 Ct. Cl. 69.

<sup>20</sup> See *supra*, § 183.

<sup>1</sup> *Illinois*.—*Moshier v. Kitchell*, 87 Ill. 18.

profits of the firm is usually fixed in the partnership agreement. In the absence of such a stipulation, however, it will be presumed that they are entitled to share equally.<sup>2</sup> Nothing that either may do in regard to the partnership business can be regarded as extra services. One may do less, but the other cannot do more, than his duty; and one partner has no remedy against another member of the firm who does less than his duty in transacting the business of the firm, excepting in a proceeding to dissolve the partnership.<sup>3</sup> Thus where two attorneys entered into a partnership to perform legal services, the earnings to be divided, and one of them was not to perform any services until a future date, but the other was to perform services in the meantime, it was held that so long as the first attorney was ready and willing to serve whenever called upon, the fact that the other did substantially all the work gave him no claim to more than half the earnings.<sup>4</sup> The mere neglect of one of the partners to perform services under the partnership contract does not, of itself, amount to an abandonment of the contract by him.<sup>5</sup> A refusal to perform services, however, is of more significance; it might, under certain circumstances, amount to a dissolution of the firm, as between the parties, especially where the partnership is limited to a single transaction.<sup>6</sup> Certainly a partner who so far disregards his duty to the firm of which he is a member as to repudiate his obligation to serve the firm's clients, or any of them, is entitled to no part of the compensation earned by the other partners for services rendered in connection with the business in which he refused to act.<sup>7</sup>

*Michigan*.—Eggleston *v.* Boardman, 37 Mich. 19; Ostrander *v.* Capitol Invest., etc., Assoc., 130 Mich. 312, 89 N. W. 964.

*New York*.—Harland *v.* Lilienthal, 53 N. Y. 438.

*Tennessee*.—Vinson *v.* Cantrell, 56 S. W. 1034.

*Texas*.—Wright *v.* McCampbell, 75 Tex. 644, 13 S. W. 293; Landa *v.* Shook, 87 Tex. 608, 30 S. W. 536.

*Washington*.—Dennis *v.* Seattle First Nat. Bank, 33 Wash. 161, 73 Pac. 1125.

*Wisconsin*.—Jackson *v.* Bohrman, 59 Wis. 422, 18 N. W. 456; Remington *v.* Eastern R. Co., 109 Wis. 154, 84 N. W. 898, 85 N. W. 321.

<sup>2</sup> Henry *v.* Bassett, 75 Mo. 89.

<sup>3</sup> Roth *v.* Boies, 139 Ia. 253, 115 N. W. 930; Henry *v.* Bassett, 75 Mo. 89.

<sup>4</sup> Bundy *v.* McLean, 104 Wis. 263, 80 N. W. 445.

<sup>5</sup> Henry *v.* Bassett, 75 Mo. 89.

<sup>6</sup> Henry *v.* Bassett, 75 Mo. 89.

<sup>7</sup> Denver *v.* Roane, 99 U. S. 355, 25 U. S. (L. ed.) 476. See also Troy *v.* Hall, 157 Ala. 592, 47 So. 1035.

§ 472. **Effect of Dissolution.** — On the dissolution of a law partnership the duties, rights, and liabilities of the firm are governed by the general principles applicable to commercial partnerships.<sup>8</sup> When one member of a firm of general practitioners dies, it becomes the duty of the surviving partners to hold themselves in readiness to carry to completion all executory contracts for the services of the firm which were in force at the time of its dissolution.<sup>9</sup> In the absence of an objection by the firm's clients, the survivors may complete the business on hand,<sup>10</sup> and, on so doing, will be entitled to the compensation stipulated for with the firm, or, if there is no such stipulation, to the reasonable value of the services rendered.<sup>11</sup> Where, however, the client had agreed with the firm for a fixed sum for its services, the surviving members, or any of them, who undertake to complete the work will be presumed to have acted under the firm agreement in so far as the amount of their compensation is concerned, and they are not entitled to any additional pay in the absence of a new contract.<sup>12</sup> The survivor, having completed the service and received the compensation, must pay to the representatives of the deceased partner so much of it as is equivalent to his portion of the work done.<sup>13</sup> Nor can the survivors enter into a new contract with the client for the performance of the same services, and thereby defeat the claim of the estate of a deceased partner for the compensation due him under the original contract.<sup>14</sup> On the dissolution of a firm otherwise than by

<sup>8</sup> See *supra*, § 185. See also Walker *v.* Goodrich, 16 Ill. 341; Clifton *v.* Clark, 83 Miss. 446, 1 Ann. Cas. 396, 36 So. 251, 102 Am. St. Rep. 458, 66 L.R.A. 821.

<sup>9</sup> Clifton *v.* Clark, 83 Miss. 446, 1 Ann. Cas. 396, 36 So. 251, 102 Am. St. Rep. 458, 66 L.R.A. 821.

<sup>10</sup> Moshier *v.* Kitchell, 87 Ill. 18; Bessie *v.* Northern Pac. R. Co., 14 N. D. 614, 105 N. W. 936.

<sup>11</sup> Smith *v.* Hill, 13 Ark. 174; Walker *v.* Goodrich, 16 Ill. 341; Wright *v.* McCampbell, 75 Tex. 644, 13 S. W. 293; Noble *v.* Bellows, 53 Vt. 527.

<sup>12</sup> Moses *v.* Bagley, 55 Ga. 283; King *v.* Barber, 61 Ia. 674, 17 N. W. 88; Dowd *v.* Troup, 57 Miss. 204; Clifton *v.* Clark, 83 Miss. 446, 1 Ann. Cas. 396, 36 So. 251, 102 Am. St. Rep. 458, 66 L.R.A. 821; Bessie *v.* Northern Pac. R. Co., 14 N. D. 614, 105 N. W. 936.

<sup>13</sup> Babbitt *v.* Riddell, 1 Grant Cas. (Pa.) 161.

<sup>14</sup> Clifton *v.* Clark, 83 Miss. 446, 1 Ann. Cas. 396, 36 So. 251, 102 Am. St. Rep. 458, 66 L.R.A. 821.



death it is customary for the partners to agree among themselves as to the disposition of the firm's business. These agreements will, of course, bind the parties to them; thus it has been held that where a law firm dissolves, assigning undisposed cases to the several members, and the agreement of dissolution is supported by sufficient consideration, each member who in good faith undertakes to carry out his part of the agreement is entitled to prosecute to completion the cases assigned to him, and services rendered by other members to him in such cases will be deemed to be gratuitous.<sup>15</sup> So, where one of the members is subsequently employed under a new contract by a client of the old firm in a case commenced before the dissolution, and which was assigned to such member, a settlement between the members of fees due to the firm in such case, made with a knowledge of the subsequent employment, will be upheld.<sup>16</sup> In the absence of any agreement between the partners, the individual members are entitled to the *pro rata* share of the fees earned up to the time of dissolution.<sup>17</sup> A member of a law firm, who has withdrawn therefrom, can have no interest in fees for services rendered by the remaining member of the firm in concluding the firm business.<sup>18</sup> As to the effect of a dissolution on the right of the survivors to complete the firm business contrary to the wishes of the client, a different situation is presented. The rule in this respect is that where a client enters into a contract with a firm of attorneys for certain legal services to be rendered for a fee stated, or upon an implied promise to pay the value of the services, and the firm is dissolved before the contract is finally completed, the client then has the option of abrogating the contract entirely by discharging the survivors, settling for services previously rendered, and employing other counsel to conclude his pending litigation.<sup>19</sup> But the client must exercise this right with reason-

<sup>15</sup> *Lamb v. Wilson*, 3 Neb. (unofficial) Rep. 496, 92 N. W. 167.

<sup>16</sup> *Lamb v. Wilson*, 3 Neb. (unofficial) Rep. 496, 92 N. W. 167.

<sup>17</sup> *Justice v. Lairy*, 19 Ind. App. 272, 49 N. E. 459, 65 Am. St. Rep. 405; *Isenhart v. Hazen*, 10 Kan. App. 577 mem., 63 Pac. 451.

<sup>18</sup> *Justice v. Lairy*, 19 Ind. App. Attys. at L. Vol. II.—53.

272, 49 N. E. 459, 65 Am. St. Rep. 405; *Isenhart v. Hazen*, 10 Kan. App. 577 mem., 63 Pac. 451. See also *Troy v. Hall*, 157 Ala. 592, 47 So. 1035.

<sup>19</sup> *McGill v. McGill*, 2 Met. (Ky.) 258; *Clifton v. Clark*, 83 Miss. 446, 1 Ann. Cas. 396, 36 So. 651, 102 Am. St. Rep. 458, 66 L.R.A. 821, following

able promptness; otherwise he will be deemed to have authorized the further prosecution of the suit or matter in hand by the surviving partner or partners.<sup>20</sup> Other matters in connection with the dissolution of law partnerships have been considered heretofore.<sup>21</sup>

§ 473. **On Winding Up Business.** — The general rule is that the members of a law partnership who, upon its dissolution, remain to wind up its affairs, are not entitled to compensation for services rendered in that connection unless it is expressly agreed otherwise, or can be fairly implied from the circumstances.<sup>1</sup> But this rule does not extend beyond the requirements of merely winding up the firm's affairs;<sup>2</sup> and where other services, such as those involving the professional skill, learning, and experience of the remaining partners, are required, a reasonable compensation, varying according to the nature of the business, should be allowed.<sup>3</sup>

Cox v. Martin, 75 Miss. 238, 21 So. 611, 65 Am. St. Rep. 604, 36 L.R.A. 800; Landa v. Shook, 87 Tex. 609, 30 S. W. 536. And see *supra*, § 185.

An obligation to furnish and apply to the conduct of a lawsuit the learning, ability, and experience of two particular attorneys is not performed by furnishing the services of one of them, although the services of others of equal or superior ability are also furnished. When one agrees to pay a certain compensation for the services in a specified matter of two or more attorneys or agents whom he selects or names, that contract is not performed, and that compensation cannot be recovered, when any one of them dies, or abandons the agreement, before it is substantially performed, because the services of that one have not been furnished. Baxter v. Billings, 83 Fed. 790, 49 U. S. App. 767, 28 C. C. A. 85.

<sup>20</sup> McGill v. McGill, 2 Met. (Ky.) 258.

<sup>21</sup> See *supra*, § 185.

<sup>1</sup> Consaul v. Cummings, 222 U. S. 262, 32 S. Ct. 83, 56 U. S. (L. ed.) 192, *affirming* 33 App. Cas. (D. C.) 132; Roth v. Boies, 139 Ia. 253, 115 N. W. 930; Lamb v. Wilson, 3 Neb. (unofficial) Rep. 496, 92 N. W. 167; Thayer v. Badger, 171 Mass. 279, 50 N. E. 541; Sterne v. Goep, 20 Hun (N. Y.) 396.

<sup>2</sup> Lamb v. Wilson, 3 Neb. (unofficial) Rep. 496, 92 N. W. 167.

<sup>3</sup> Roth v. Boies, 139 Ia. 253, 115 N. W. 930. And see Consaul v. Cummings, 222 U. S. 262, 32 S. Ct. 83, 56 U. S. (L. ed.) 192, *affirming* 33 App. Cas. (D. C.) 132.

In Sterne v. Goep, 20 Hun (N. Y.) 396, it was said that it would be a harsh rule which would require the surviving partner of a law firm to take upon himself the conduct of all pending litigations in the office at the time of his partner's decease, and devote his professional skill and labor through a possible period of years to conducting and closing it up for the benefit of the estate of the deceased,

Thus the active partners, who undertake to finish the work, are entitled to extra compensation for the management of such litigation as the firm had on hand at the time of its dissolution.<sup>4</sup> The partners may, however, agree as to their respective rights in winding up the firm business. Thus where all the partners agreed that the partnership should be terminated on a certain day, and that the business then on hand should be closed as rapidly as possible "as partners under their original terms of association and in the firm name," and that, in case of the death of either of them, his heirs or representatives should receive one third of the fees in cases nearly finished, and twenty-five per cent in other partnership cases, it was held in an action brought by the executor of one of the partners to recover his share of the fees, that the partners having by agreement provided for the amount of the fees in case of death, the survivors were not entitled to an allowance for winding up the business.<sup>5</sup>

#### § 474. Services Performed in Individual Capacity. —

The members of a law firm constitute one person in law, and the act of one in the course of the partnership business is the act of all. The rendition of professional services by one who is a member of the law firm is presumed to be in behalf of his firm, and should he act in his individual capacity the burden is on him to show that fact.<sup>6</sup> One of the partners may, of course, be employed individually, and, in such case, the compensation earned will be divided with the other members of the firm unless the partnership agreement provides otherwise. When attorneys in partnership permit one member of their firm to make personal contracts for his services, it is upon the implied condition that the other members cannot be employed against their partner's client. They may assist him, but they cannot oppose him. Nor can they recover for

and with the obligation ultimately to account to his representatives for an equal share of all the profits so earned.

<sup>4</sup> *Roth v. Boies*, 139 Ia. 253, 115 N. W. 930; *Sterne v. Goep*, 20 Hun (N. Y.) 396. See also *Denver v. Roane*, 99 U. S. 355, 25 U. S. (L. ed.) 476.

<sup>5</sup> *Denver v. Roane*, 99 U. S. 355, 25 U. S. (L. ed.) 476, and compare *Consaul v. Cummings*, 222 U. S. 262, 32 S. Ct. 83, 56 U. S. (L. ed.) 192, *affirming* 33 App. Cas. (D. C.) 132, in which this decision is referred to.

<sup>6</sup> *Shirts v. Rooker*, 21 Ind. App. 420, 52 N. E. 629.

services rendered in such cases to their partner's personal client, unless there is an express agreement to that effect. The presumption is that such partner has made satisfactory arrangements with the firm either for a division of his compensation, or for some other valuable consideration.<sup>7</sup> So, an attorney at law, who is also a partner of a mercantile firm, is not entitled to charge commissions for collecting the notes and accounts of that firm as against his co-partner, in the absence of any special agreement to that effect. The legal presumption is that he was to collect the debts due the firm, as a partner, for the benefit of the concern.<sup>8</sup> A contract with a firm for the services of a particular partner at a stipulated fee cannot be broken by the client upon the death of such partner without tendering to the survivor a fair compensation for the services already rendered; and if the surviving partner shall render the services with due professional skill and diligence he is entitled to the entire fee.<sup>9</sup> A member of a law firm has a right to attend to his individual interests having no connection with the practice of his profession, and his partners cannot complain unless such action so abstracts his attention or absorbs his time as to materially interfere with his professional duties.<sup>10</sup> This was true as to services rendered by one of the partners to a corporation in which he was a stockholder, and which were not of a legal nature, and did not come within the scope of the partnership business or interfere therewith.<sup>11</sup> So, also, as to services rendered by one of the partners as the executor of an estate,<sup>12</sup> or in caring for the property and interests of his wife and relatives in probate proceedings. These, and the like, are not "professional services," and the earnings therein are not partnership property.<sup>13</sup> There may, of course, be an agreement between the partners to the effect that each, or certain, of its members may be employed individually, and that the compensation for services so rendered may be retained by the

<sup>7</sup> *Ostrander v. Capitol Invest., etc., Assoc.*, 130 Mich. 312, 89 N. W. 964.

<sup>8</sup> *Vanduzer v. McMillan*, 37 Ga. 299.

<sup>9</sup> *Smith v. Hill*, 13 Ark. 174; *Wright v. McCampbell*, 75 Tex. 644, 13 S. W. 293. And see *supra*, § 472.

<sup>10</sup> *Roth v. Boies*, 139 Ia. 253, 115 N. W. 930.

<sup>11</sup> *Brown v. Cragg*, 230 Ill. 299, 82 N. E. 569, *reversing* 129 Ill. App. 597.

<sup>12</sup> *Metcalfe v. Bradshaw*, 145 Ill. 124, 33 N. E. 1116, 36 Am. St. Rep. 478, *affirming* 43 Ill. App. 286.

<sup>13</sup> *Roth v. Boies*, 139 Ia. 253, 115 N. W. 930.

partners so employed. In such cases the partner may maintain an action in his own name for the value of his services.<sup>14</sup>

**§ 475. Accounting.** — Differences between law partners as to the proper division of the firm profits are, as in the case of other partnerships, adjustable in an action for an accounting,<sup>15</sup> but not in summary proceedings.<sup>16</sup> Where one of the partners claims a share in excess of the proportion to which he is entitled under the written contract of partnership by virtue of an alleged change in its terms, the burden is upon him to establish the change by at least a fair preponderance of the evidence.<sup>17</sup> Accounting between attorney and client has been considered heretofore.<sup>18</sup>

*Retention of Fees from Funds in Hand.*

**§ 476. Generally.** — It is well settled that an attorney may retain from the funds of his client, in his hands, the amount of his

<sup>14</sup> McCabe v. Goodfellow, 21 Civ. Pro. 66, 15 N. Y. S. 377.

<sup>15</sup> Denver v. Roane, 99 U. S. 355, 25 U. S. (L. ed.) 476; Brown v. Cragg, 230 Ill. 299, 82 N. E. 569, reversing 129 Ill. App. 597; Bundy v. McLean, 104 Wis. 263, 80 N. W. 445.

*There having been no general partnership between the parties, but merely an arrangement that one should receive and retain the fees from civil cases, and the other those from the criminal business, and this having been done, there is no occasion for an accounting.* Fitzsimmons v. Robb, 193 Pa. St. 518, 44 Atl. 558.

<sup>16</sup> Dorsey v. Metropolitan St. R. Co., 143 Mo. App. 428, 128 S. W. 17.

<sup>17</sup> Roth v. Boies, 139 Ia. 253, 115 N. W. 930.

In this accounting of the affairs of a special partnership between attorneys at law, the survivor claims compensation for services rendered after dissolution of the firm. Claims

of this sort are not favored. They lead to efforts to prove a disparity between the partners, when the law implies equality. They necessitate a balancing of the value of the work of each in securing the business and earning the profits, as well as a comparison of the time they may spend on the matters under consideration. Each partner is bound to devote himself to the firm's business, and there is no implied obligation that, for performing this duty, he should be paid more than his proportionate share of the gains. Neglect by one to do his part may be of such character as to justify a dissolution. But as long as the firm continues, there is usually no deduction because one partner has not been as active as the other. *Consaul v. Cummings*, 222 U. S. 262, 32 S. Ct. 83, 56 U. S. (L. ed.) 192, affirming 33 App. Cas. (D. C.) 132.

<sup>18</sup> See *supra*, § 344.

compensation. If the exact sum has been agreed upon, that sum may be retained; if not, then he may retain a sufficient sum to cover the reasonable value of his services,<sup>19</sup> with such sums as were properly expended by him in the interest of his client;<sup>20</sup> and also like fees for the benefit of the associate counsel in the case employed by his client to assist him;<sup>1</sup> and he may successfully defend a suit against him for the recovery of any part of the reasonable charges so retained,<sup>2</sup> though it is said that there is no implied agreement that the attorney shall look to the fund to be realized as a primary source of payment.<sup>3</sup> It is immaterial that his compen-

<sup>19</sup> *Alaska*.—Nodine v. Hannum, 1 Alaska 302.

*District of Columbia*.—Melo v. Meloy, 24 App. Cas. 239.

*Indiana*.—Union Mut. L. Ins. Co. v. Buchanan, 100 Ind. 63.

*Louisiana*.—Monget v. Tessier, 5 La. Ann. 165; Butchers' Union, etc., Co. v. Crescent City Live-Stock, etc., Co., 41 La. Ann. 355, 6 So. 508.

*Massachusetts*.—See Soper v. Manning, 147 Mass. 126, 16 N. E. 752; Blake v. Coreoran, 211 Mass. 406, 97 N. E. 1002.

*Michigan*.—Dowling v. Eggemann, 47 Mich. 171, 10 N. W. 187.

*Minnesota*.—Washington County v. Clapp, 83 Minn. 512, 86 N. W. 775.

*Missouri*.—Beagles v. Robertson, 135 Mo. App. 306, 115 S. W. 1042.

*New Jersey*.—Sparks v. McDonald, 41 Atl. 369.

*New York*.—Sherwood v. Buffalo & New York City R. Co., 12 How. Pr. 136; In re Holland Trust Co., 76 Hun 323, 27 N. Y. S. 687. And see In re Tracy, 1 App. Div. 113, 37 N. Y. S. 65, affirmed 149 N. Y. 608, 44 N. E. 1129.

*North Carolina*.—Wiley v. Logan, 95 N. C. 358.

*Ohio*.—Christy v. Douglas, Wright 485.

*Pennsylvania*.—Com. v. Herr, 1 Pearson 328; Balsbaugh v. Frazer, 19 Pa. St. 95.

*Tennessee*.—Foster v. Jackson, 8 Baxt. 433; Read v. Bostick, 6 Humph. 321.

*Texas*.—Kinsey v. Stewart, 14 Tex. 457; Randolph v. Randolph, 34 Tex. 181; Henry v. Boedker, 141 S. W. 811; Thomson v. Findlater, Hardware Co., 156 S. W. 301.

*Vermont*.—Scott v. Darling, 66 Vt. 510, 29 Atl. 993; In re Aldrich, 86 Atl. 801.

*West Virginia*.—Bent v. Lipscomb, 45 W. Va. 183, 31 S. E. 907, 72 Am. St. Rep. 815.

<sup>20</sup> Balsbaugh v. Frazer, 19 Pa. St. 95. See also *infra*, § 486.

<sup>1</sup> *Rights of Associate Counsel*.—Jackson v. Clopton, 66 Ma. 29; Louisville, etc., R. Co. v. Proctor, (Ky.) 51 S. W. 591; Balsbaugh v. Frazer, 19 Pa. St. 95. See also Christy v. Douglas, Wright (Ohio) 485.

<sup>2</sup> See *supra*, §§ 350-352; 362, 363. See also Sparks v. McDonald, (N. J.) 41 Atl. 369; Foster v. Jackson, 8 Baxt. (Tenn.) 433.

<sup>3</sup> Bodfish v. Fox, 23 Me. 90, 39 Am. Dec. 611; Nichols v. Scott, 12 Vt. 47.

sation was contingent upon success,<sup>4</sup> or that his client acted in a fiduciary capacity,<sup>5</sup> or as a public official,<sup>6</sup> or that the fund has been attached,<sup>7</sup> or that the client died before the termination of the professional relation,<sup>8</sup> or that the attorney accepted an order to pay over the sum collected to another.<sup>9</sup> A writing given by a client to his attorney, authorizing the attorney to retain out of a judgment when recovered, a part for his compensation, is an assignment of such part.<sup>10</sup> But an attorney at law who has collected money for his client cannot set off, against his client's claim for that money, a debt due to himself for services as counsel in a proceeding other than that out of which the money came, unless the client has expressly agreed that the fund shall be so appropriated;<sup>11</sup> nor can he retain out of money collected for his client as an individual, compensation for his services rendered to the client as a trustee, without establishing an agreement on the part of the client that the money should be so retained.<sup>12</sup> Thus the attorney for an administratrix has no right to retain from funds collected for her, an amount due to him from her decedent.<sup>13</sup> Nor can an attorney who receives from a collection agency a claim in the name of another person, retain the money collected thereon to satisfy his demand against the agency for services rendered to it.<sup>14</sup> An attorney

<sup>4</sup> *Beagles v. Robertson*, 135 Mo. App. 306, 115 S. W. 1042.

<sup>5</sup> *In re Holland Trust Co.*, 76 Hun 323, 27 N. Y. S. 687.

<sup>6</sup> *Com. v. Herr*, 1 Pearson (Pa.) 328.

<sup>7</sup> *Randolph v. Randolph*, 34 Tex. 181.

<sup>8</sup> *Meloy v. Meloy*, 24 App. Cas. (D. C.) 239.

<sup>9</sup> *Kinsey v. Stewart*, 14 Tex. 457.

<sup>10</sup> *Bent v. Lipscomb*, 45 W. Va. 183, 31 S. E. 907, 72 Am. St. Rep. 815.

<sup>11</sup> *Trapnall v. Byrd*, 22 Ark. 10; *Martin v. Throckmorton*, 15 Pa. Super. Ct. 632; *Simpson v. Pinkerton*, 10 W. N. C. (Pa.) 423; *Maxey v. Besser*, 44 Tex. 506.

*Debts Barred by Limitation.*—An attorney, after collecting money for

a client, cannot, in the absence of an agreement, apply it to the payment of the debts due him by the client, barred by limitations. *Blair v. Blanton*, 54 S. W. 321, writ of error dismissed 93 Tex. 348, 55 S. W. 321.

*Compare* *Scott v. Darling*, 66 Vt. 510, 29 Atl. 993, wherein it was said that an attorney, in the absence of special agreement, has a right to retain money collected for his client until he is paid the general balance due him for services.

<sup>12</sup> *Martin v. Throckmorton*, 15 Pa. Super. Ct. 632.

<sup>13</sup> *In re Thresher*, 29 Mont. 11, 73 Pac. 1109. See also *West v. Carleton*, 8 La. 254.

<sup>14</sup> *McMath v. Manns Bros. Boot & Shoe Co.*, (Ky.) 15 S. W. 879.

cannot withhold money belonging to his client in order to make the latter agree to unreasonable terms;<sup>15</sup> nor can he exact a receipt in full as a condition of paying over the amount admitted to be due.<sup>16</sup> And the relation between attorney and client as to money collected is not that of debtor and creditor, and retention by the client of a check offered in full settlement by the attorney is not an accord and satisfaction.<sup>17</sup> Nor can an attorney who receives a sum of money from his client for the purpose of effecting a settlement, retain his fees out of the money so received.<sup>18</sup> So, where a husband is ordered to pay a certain sum weekly to his wife's attorney for alimony, and to pay a further sum for counsel fees, the attorney to whom such payment is made is not entitled to use any part of the alimony for the payment of disbursements in the action, but he is required to pay over the entire amount so received for the wife's support.<sup>19</sup> Nor can an attorney who renders services in a suit for the recovery of public funds under a void contract of employment, retain any portion of such funds as compensation for his services under an implied contract.<sup>20</sup> When it appears that an attorney retains his client's money, claiming a lien thereon, and upon the facts stated the right is clear, the amount only being in question, the court has jurisdiction to determine that question on an application to compel the payment of the moneys retained;<sup>1</sup> and where the attorney's claim does not extend to the whole fund, the court will order the surplus to be paid over.<sup>2</sup> In order to entitle an attorney to retain a commission out of moneys of an estate collected under the employment of the administrator, he must show that the probate court authorized the employment, or sanctioned it by the subsequent allowance of the claim; and where such services are necessary to prevent loss or waste it is the duty of the court to allow compensation.<sup>3</sup>

<sup>15</sup> *Robinson v. Hawes*, 56 Mich. 135, 22 N. W. 222.

<sup>16</sup> *Charboneau v. Orton*, 43 Wis. 96.

<sup>17</sup> *Wolfe v. Mack*, 81 Misc. 185, 142 N. Y. S. 433.

<sup>18</sup> *Anderson v. Bosworth*, 15 R. I. 413, 8 Atl. 339, 2 Am. St. Rep. 910.

<sup>19</sup> *In re Bolles*, 78 App. Div. 180, 79 N. Y. S. 530. See also *Farrar v. Far-*

*rar*, 104 Ia. 621, 74 N. W. 5; *Maxey v. Besser*, 44 Tex. 506.

<sup>20</sup> *State v. True*, 116 Tenn. 294, 95 S. W. 1028.

<sup>1</sup> *In re Knapp*, 85 N. Y. 284. See also *supra*, § 354.

<sup>2</sup> *Jeffries v. Laurie*, 23 Fed. 786.

<sup>3</sup> *Turner v. Tapscott*, 30 Ark. 312.



*Allowance of Counsel Fees in Equitable Proceedings.*

§ 477. **Allowance from Funds Recovered.**—The well-established practice of the court of equity as to counsel fees differs in several particulars from the rules of law. Thus where a fund is brought into a court of equity through the services of an attorney, he is regarded as the equitable owner thereof to the extent of the reasonable value of his services; and, to that extent, the court administering the fund will intervene for his protection,<sup>4</sup> especially where the attorney looks to such fund for his compensation.<sup>5</sup> When many persons have a common interest in a trust property or fund, and one of them, for the benefit of all, and at his own cost and expense, brings a suit for its preservation or administration, the court of equity in which the suit is brought will order that the plaintiff be reimbursed his outlay from the property of the trust, or by proportional contribution from those who accept the benefits of his efforts.<sup>6</sup> So where suits in equity, instituted on behalf of the bondholders and stockholders of a corporation, result in gather-

<sup>4</sup> *United States*.—Internal Imp. Fund *v.* Greenough, 105 U. S. 537, 26 U. S. (L. ed.) 1157; *Ex p.* Plitt, 2 Wall. Jr. (C. C.) 453, 19 Fed. Cas. No. 11,228; *Colley v.* Wolcott, 187 Fed. 595, 109 C. C. A. 425.

*Nebraska*.—In *re* Creighton's Estate, 93 Neb. 90, 139 N. W. 827.

*Pennsylvania*.—In *re* Francis, 5 Kulp 17; *McKelvy's Appeal*, 108 Pa. St. 615; *Spencer's Appeal*, 9 Atl. 523.

*South Carolina*.—*Nimmons v.* Stewart, 13 S. C. 445.

*West Virginia*.—*Weigand v.* Alliance Supply Co., 44 W. Va. 133, 28 S. E. 803.

<sup>5</sup> *McKelvy's Appeal*, 108 Pa. St. 615; *Blair v.* Harrison, 57 Fed. 257, 18 U. S. App. 27, 6 C. C. A. 326, *affirming* 51 Fed. 693.

A mere stakeholder, even though he is an attorney, who has been made a party to a proceeding for the recovery of a fund in his possession, will not be

allowed counsel fees where he has personally appeared in the proceeding; it is otherwise, however, as to his costs and expenses. *Moore v.* Jones, 23 Vt. 739, 17 Fed. Cas. No. 9,768.

<sup>6</sup> *United States*.—*Hobbs v.* McLean, 117 U. S. 567, 6 S. Ct. 870, 29 U. S. (L. ed.) 940; *Adams v.* Kehlor Milling Co., 38 Fed. 281; *Lamar v.* Hall, 129 Fed. 79, 63 C. C. A. 521, *reversing* 129 Fed. 141.

*Kentucky*.—*Stone v.* Wilson, 56 S. W. 817, 22 Ky. L. Rep. 190.

*Maryland*.—*Bauernschmidt v.* Bauernschmidt, 101 Md. 148, 60 Atl. 437.

In proceedings to wind up the affairs of a corporation, counsel fees for services rendered therein and in the general litigation should be paid out of the aggregate recovery, all creditors claiming benefit of the suit to contribute pro rata, while fees for counsel services as are performed only for petitioning creditors must be

ing a fund which inures to the benefit of all, such fund, being purely equitable, is subject to the payment of equitable costs, including the fees and disbursements of the solicitors for the complainants for services rendered up to the time of final decree.<sup>7</sup> This rule has also been applied to creditors' suits where a fund has been realized by the diligence of the plaintiff,<sup>8</sup> and to suits for the recovery of property wrongfully converted<sup>9</sup> or fraudulently transferred,<sup>10</sup> and to recoveries from a decedent's estate,<sup>11</sup> and also where the parties for whose benefit the services were rendered are infants or lunatics, or, from any other cause, are not capable of contracting;<sup>12</sup> and, generally, in all cases, where the parties are numerous and have an interest in common for the benefit of which professional services are rendered at the instance of one or more of them.<sup>13</sup> The rule rests upon the ground that where one litigant has borne the burden and expense of a litigation that has inured to the benefit of others as well as himself, those who have shared in the benefits should contribute to the expense.<sup>14</sup> Such contribution, for want of a better name, is often spoken of merely as an equity or a lien. In so far as it may be deemed to be a lien, it will be considered later.<sup>15</sup> A previous agreement of the parties, or an

paid by the latter out of funds recovered for them. *Moses v. Ocoee Bank*, 1 Lea (Tenn.) 398.

<sup>7</sup> *Edwards v. Bay State Gas Co.*, 172 Fed. 971; *Colley v. Wolcott*, 187 Fed. 595, 109 C. C. A. 425. See also *Campbell v. Provident Sav., etc., Soc.*, (Tenn.) 61 S. W. 1090.

<sup>8</sup> *England*.—*Stanton v. Hatfield*, 1 Keen 358; *Thompson v. Cooper*, 2 Col. Ch. Cas. 87; *Tootal v. Spier*, 4 Sim. 510; *Larkins v. Paxton*, 2 Myl. & K. 320; *Barker v. Wardle*, 2 Myl. & K. 818; *Sutton v. Doggett*, 3 Beav. 9.

*United States*.—*Internal Imp. Fund v. Greenough*, 105 U. S. 537, 26 U. S. (L. ed.) 1157; *Central R. Co. v. Pettus*, 113 U. S. 116, 5 S. Ct. 387, 28 U. S. (L. ed.) 915.

*Tennessee*.—*Bristol-Goodson Electric Light, etc., Co. v. Bristol Gas,*

*etc., Co.*, 99 Tenn. 371, 42 S. W. 19; *Blount County Bank v. Smith*, 48 S. W. 296; *Campbell v. Provident Sav., etc., Soc.*, 61 S. W. 1090.

<sup>9</sup> *Harrison v. Perea*, 168 U. S. 311, 18 S. Ct. 129, 42 U. S. (L. ed.) 478.

<sup>10</sup> *Adams v. Kehlor Milling Co.*, 38 Fed. 281; *Colley v. Wolcott*, 187 Fed. 595, 109 C. C. A. 425.

<sup>11</sup> *Kirk v. Breed*, 4 Ohio Dec. 403, 3 Ohio N. P. 122; *Nimmons v. Stewart*, 13 S. C. 445.

<sup>12</sup> *Nimmons v. Stewart*, 13 S. C. 445.

<sup>13</sup> *U. S. v. Boyd*, 79 Fed. 858; *Nimmons v. Stewart*, 13 S. C. 445.

<sup>14</sup> *Internal Imp. Fund v. Greenough*, 105 U. S. 527, 26 U. S. (L. ed.) 1157; *Lamar v. Hall*, 129 Fed. 79, 63 C. C. A. 521.

<sup>15</sup> See *infra*, § 618 et seq.

order of the court that a receiver should employ counsel without compensation, is not binding on the court in equity; and, whenever it may determine that counsel should be compensated for preserving a fund in court, it may direct a fee to be paid to the receiver's counsel out of such fund.<sup>16</sup> But, even though there is a fund in its keeping, the court will not interfere between an attorney and client in making allowance for professional services.<sup>17</sup> And the amount allowed should be credited to the client on his contract with the attorney.<sup>18</sup> The amount which shall be allowed is, as a rule, fixed by the judge<sup>19</sup> in the exercise of a sound judicial discretion, and with due regard to the interests of all parties concerned.<sup>20</sup> The attorney, if he so desires, should be heard as to the reasonableness of the allowance.<sup>1</sup> Where a number of cases present the same questions, and certain ones are selected as test cases, the amount allowed to attorneys should be charged *pro rata* against the whole number of cases.<sup>2</sup> The practice varies to some extent in the several jurisdictions. Generally, however, an attorney may have a rule to show cause why a fund in court should not be applied in payment of his fees.<sup>3</sup> It is not necessary to attach a bill of particulars.<sup>4</sup> And when an allowance to the complainant is proper on account of solicitors' fees, it may be made directly to the solicitors themselves, without any application by their immediate client.<sup>5</sup> In a suit by the United States to enjoin a sale of timber effected by an attorney for a band of Indians, the timber having been sold and the sale approved by the court, the attorney was permitted to intervene for the allowance of his claim for services in effecting the sale, to be paid out of the proceeds.<sup>6</sup> Where a fund

<sup>16</sup> *Oliver v. South Carolina Interstate, etc., Exposition Co.*, 68 S. C. 568, 47 S. E. 988.

<sup>17</sup> *Mordecai v. Devereux*, 74 N. C. 673.

<sup>18</sup> *Shreve v. Freeman*, 44 N. J. L. 78; *Freeman v. Shreve*, 86 Pa. St. 135.

<sup>19</sup> *Herwig's Succession*, 127 La. 127, 53 So. 466.

<sup>20</sup> *Stoneburner v. Motley*, 95 Va. 784, 30 S. E. 364; *German Nat. Ins. Co. v. Virginia State Ins. Co.*, 108 Va. 393, 61 S. E. 870.

<sup>1</sup> *Combs v. Combs*, 82 S. W. 298, 26 Ky. L. Rep. 617.

<sup>2</sup> *Greeff v. Miller*, 87 Fed. 33.

<sup>3</sup> *Walker v. Floyd*, 30 Ga. 237. See also *Olds v. Tucker*, 35 Ohio St. 581.

<sup>4</sup> *Walker v. Floyd*, 30 Ga. 237.

<sup>5</sup> *Central R. Co. v. Pettus*, 113 U. S. 115, 5 S. Ct. 387, 28 U. S. (L. ed.) 915; *Colley v. Wolcott*, 187 Fed. 595, 109 C. C. A. 425.

<sup>6</sup> *U. S. v. Boyd*, 79 Fed. 858.

has been withdrawn from the custody of the court, it may be recalled on a showing that such withdrawal is in fraud of the solicitor.<sup>7</sup> On an appeal by one of a number of attorneys from an order awarding them compensation for services rendered in a suit from a fund in court, the Court of Appeals is not confined to the question of the proper distribution between them of the entire sum allowed for the services, but the whole question of the value of the appellant's services is open, and the court may make a redivision of the total amount so allowed, or may increase the allowance to the appellant without disturbing the other allowances.<sup>8</sup>

**§ 478. When Allowance Will Be Denied.** — The power, considered in the preceding section, of allowing counsel fees from funds recovered in equity acts on the *res* alone; therefore, where the *res* is beyond the control of the court, the attorney must seek some other remedy.<sup>9</sup> Thus where a final decree of distribution has been made, awarding to a *cestui que trust* the entire balance in the trustee's hands, the court cannot disturb the decree by making an allowance for fees to counsel for the *cestui que trust*.<sup>10</sup>

While it is true that a chancellor will often order compensation to the counsel of a losing party who is decreed to have no interest, on the equitable ground that being a necessary party he was compelled to litigate, or had sufficient reason, and that the fund ought in equity and good conscience to bear such expense,<sup>11</sup> counsel fees will not be allowed to those who assume a position antagonistic to the preservation of the fund for the general welfare of all concerned.<sup>12</sup> Thus where one brings adversary proceedings to take the possession of trust property from those entitled to it, in order that he may distribute it to those who claim adversely, and fails in his purpose, such person has no right to demand reimbursement

<sup>7</sup> *Dennis v. Kent* Circuit Judge, 42 Mich. 249, 3 N. W. 950.

<sup>8</sup> *Glidden v. Cowen*, 123 Fed. 48, 59 C. C. A. 172.

<sup>9</sup> *Bray v. Staples*, 180 Fed. 321, 103 C. C. A. 451.

<sup>10</sup> *In re Gingrich*, 9 Pa. Co. Ct. 16.

<sup>11</sup> *Freeman v. Shreve*, 86 Pa. St. 135.

<sup>12</sup> *Hobbs v. McLean*, 117 U. S. 567, 6 S. Ct. 870, 29 U. S. (L. ed.) 940; *Lamar v. Hall*, 129 Fed. 79, 63 C. C. A. 521, *reversing* 129 Fed. 141; *Baltimore, etc., R. Co. v. Brown*, 79 Md. 442, 29 Atl. 524; *Roller v. Paul*, 106 Va. 214, 55 S. E. 558; *McCormick v. Elsea*, 107 Va. 472, 59 S. E. 411.

of his expenses out of the trust fund, or contribution from those whose property he sought to misappropriate.<sup>13</sup> So, where a client does not participate in a fund brought into court, but is postponed to older liens, the attorney is not entitled to a commission on the money collected, although it is by his efforts the money is brought in for distribution.<sup>14</sup> One employed by the policy holders of a mutual insurance company to contest the validity of assessments laid upon them, in enjoining the company from doing business, is not entitled to be paid for his services out of the funds in the hands of the receivers.<sup>15</sup> Where there were two parties, each claiming to be the rightful governing body of a corporation, and acting in hostility to each other, the attorneys acting for that party which is adjudged not to be the legal governing body cannot recover for their services from the funds of the corporation.<sup>16</sup> It has also been held that counsel fees will not be allowed for services which were not beneficial.<sup>17</sup>

In some jurisdictions attorneys' fees cannot be made a charge upon a general fund for distribution, even though such fund became available by reason of their professional services, unless it also appears that such counsel were, expressly or impliedly, bound to serve all of the owners of such fund; and it is immaterial that those who did not employ such counsel were indirectly benefited by their services.<sup>18</sup> And in any event it is only where the allowance is to be made out of a common fund that the power can be

<sup>13</sup> *Hobbs v. McLean*, 117 U. S. 567, 6 S. Ct. 870, 29 U. S. (L. ed.) 940.

<sup>14</sup> *Baxter v. Bates*, 69 Ga. 587.

<sup>15</sup> *Com. v. Mechanics' Mut. F. Ins. Co.*, 122 Mass. 421.

<sup>16</sup> *Com. v. Order of Solon*, 192 Pa. St. 487, 43 Atl. 1084.

<sup>17</sup> *Merriek v. Bonness*, 66 Minn. 135, 68 N. W. 850; *Dwinnell v. Badger*, 74 Minn. 405, 77 N. W. 219. See also *Waters v. Greenway*, 17 Ga. 592; *Mitchell v. Atkins*, 71 Ga. 680; *Hume v. Commercial Bank*, 13 Lea (Tenn.) 496.

<sup>18</sup> *Louisiana*.—*Gentile v. Plasencia*, 10 La. Ann. 203.

*Maryland*.—*McGraw v. Canton*, 74 Md. 554, 22 Atl. 132.

*Mississippi*.—*Rives v. Patty*, 74 Miss. 381, 20 So. 862, 60 Am. St. Rep. 510.

*South Carolina*.—*Nimmons v. Stewart*, 13 S. C. 445; *Ex p. Fort*, 36 S. C. 19, 15 S. E. 333; *Park v. Laurens*, 68 S. C. 218, 46 S. E. 1012; *Cauthen v. Cauthen*, 76 S. C. 226, 56 S. E. 978.

*Tennessee*.—See *State v. Edgefield*, etc., R. Co., 4 Baxt. 92.

*Virginia*.—See *German Nat. Ins. Co. v. Virginia State Ins. Co.*, 108 Va. 393, 61 S. E. 870.

exercised. The court cannot adjudicate contract rights between attorney and client.<sup>19</sup>

It is, of course, true that each client should compensate his own solicitor, and that an attorney cannot make another person his debtor by voluntarily rendering services in his behalf without his express or implied assent. But the allowance of compensation to attorneys out of funds recovered in equity is not in conflict with this principle; indeed, it is founded upon it, for it depends on the principle of agency; the actual plaintiff being the representative of the other beneficiaries. The application of this principle is of every-day occurrence in the courts. Executors, administrators, guardians, receivers, and other trustees, as the agents and legal representatives of the certain beneficiaries, are allowed credit for necessary and reasonable charges, including attorney's fees, incurred by them in the protection and administration of the trust fund. The same principle is extended to other cases.<sup>20</sup> Counsel whose services inure to the benefit of several persons having interests in common, may truthfully be said to represent them all, although, in fact, he was retained only by some of them, those suing having assumed to retain him for all. There is usually an express promise by the parties plaintiff to pay their solicitor, and, if not, a promise to pay him is implied by the performance and the acceptance of the solicitor's services. It seems equally clear that the creditors or other beneficiaries of the trust who come into court and accept a part of the proceeds of the property recovered or preserved by the litigation, are bound by an implied promise to pay, out of the proceeds of the fund received by them, their proportionate part of the reasonable compensation allowed the solicitor who successfully conducted the litigation.<sup>21</sup>

<sup>19</sup> A court of equity, in deciding a contest between individuals respecting their rights in certain property, when it has adjusted all the equities, and adjudged the rights of the parties, is without power to go further and say what fee the several parties shall pay their respective counsel. Claims for such services against persons *sui juris* rest on contract, ex-

press or implied, with the party to be charged or his representative. *Park v. Laurens*, 68 S. C. 218, 46 S. E. 1012; *Cauthen v. Cauthen*, 76 S. C. 226, 56 S. E. 978. And see *Rumsey v. Frank*, 84 Mo. App. 598.

<sup>20</sup> See the preceding section.

<sup>21</sup> *Lamar v. Hall*, 129 Fed. 79, 63 C. C. A. 521.

§ 479. **In Partition Proceedings.**—Amicable partition proceedings being for the benefit of all parties in interest, it is usual to allow reasonable compensation to the attorney who conducts them.<sup>1</sup> Where, however, the proceeding is adverse, each party is liable only for the counsel retained by him. He is not obliged to

<sup>1</sup>*Alabama.*—Flomerfelt *v.* Siglin, 155 Ala. 633, 47 So. 106.

*District of Columbia.*—See Arnold *v.* Carter, 19 App. Cas. 259.

*Illinois.*—Lilly *v.* Shaw, 59 Ill. 72; Stempel *v.* Thomas, 89 Ill. 146; Schaefer *v.* Kienzel, 123 Ill. 430, 15 N. E. 164; Habberton *v.* Habberton, 156 Ill. 444, 41 N. E. 222; Walker *v.* Tink, 159 Ill. 323, 42 N. E. 773; Poulter *v.* Poulter, 193 Ill. 641, 61 N. E. 1056; McMullen *v.* Reynolds, 209 Ill. 504, 70 N. E. 1041, reversing 105 Ill. App. 386; Jespersen *v.* Meck, 213 Ill. 488, 72 N. E. 1114; Jones *v.* Young, 228 Ill. 374, 81 N. E. 1042; Poage *v.* Smith, 101 Ill. App. 261; Searl *v.* Searl, 122 Ill. App. 129; Fread *v.* Hoag, 132 Ill. App. 233. See also Reynolds *v.* McMillan, 63 Ill. 46; Case *v.* Case, 103 Ill. App. 177.

*Iowa.*—Smith *v.* Smith, 132 Ia. 700, 109 N. W. 194, 119 Am. St. Rep. 581.

*Kentucky.*—Lang *v.* Constance, 46 S. W. 693.

*Louisiana.*—See Ruthenberg *v.* Helberg, 43 La. Ann. 410, 9 So. 99.

*Michigan.*—Greusel *v.* Smith, 85 Mich. 574, 48 N. W. 616; Barbour *v.* Patterson, 145 Mich. 459, 108 N. W. 973.

*Minnesota.*—Hansom *v.* Ingwaldson, 84 Minn. 346, 87 N. W. 915.

*Mississippi.*—Hoffman *v.* Smith, 61 Miss. 544; Neblett *v.* Neblett, 70 Miss. 572, 12 So. 598; Walker *v.* Williams, 84 Miss. 392, 36 So. 450.

*Montana.*—Murray *v.* Conlon, 19 Mont. 389, 48 Pac. 743.

*Nebraska.*—Johnson *v.* Emerich, 74 Neb. 303, 12 Ann. Cas. 851, 104 N. W. 169; Harper *v.* Harper, 89 Neb. 269, 131 N. W. 218; Smith *v.* Palmer, 91 Neb. 796, 137 N. W. 843.

*New Jersey.*—Coles *v.* Coles, 13 N. J. Eq. 365; Buttlar *v.* Buttlar, 70 N. J. Eq. 675, 64 Atl. 110. See also McMullin *v.* Doughty, 69 N. J. Eq. 649, 61 Atl. 265; Keeney *v.* Henning, 55 Atl. 88.

*New York.*—Story *v.* Lutkins, 77 Misc. 17, 135 N. Y. S. 118.

*Ohio.*—Lowe *v.* Phillips, 21 Ohio St. 657.

*Pennsylvania.*—Clark's Appeal, 93 Pa. St. 369, distinguishing Snyder's Appeal, 54 Pa. St. 67. See also Bell *v.* Reel, 8 Pa. Dist. Ct. 346; Heft's Estate, 9 Kulp 337.

*Rhode Island.*—Redecker *v.* Bowen, 15 R. I. 52, 23 Atl. 62; Robinson *v.* Robinson, 24 R. I. 222, 52 Atl. 992.

*Tennessee.*—Scott *v.* Marley, 124 Tenn. 388, 137 S. W. 492.

*Attorney as Party.*—It has been held, in some jurisdictions, that an attorney who is a party to partition proceedings and who conducts them in person, is not entitled to an allowance of an attorney fee. Girtman *v.* Starbuck, 48 Fla. 265, 5 Ann. Cas. 833, 37 So. 731; Cheney *v.* Ricks, 168 Ill. 533, 94 N. E. 181. See also § 484.

pay any part of his opponents' counsel fees,<sup>2</sup> although he may be benefited by the judgment.<sup>3</sup> The court in partition may not award attorney's fees out of the common fund to plaintiff's attorneys, for no part of the attorney's fees may be charged against defend-

<sup>2</sup>*Arkansas*.—*Cowling v. Nelson*, 76 Ark. 146, 88 S. W. 913; *Gardner v. McAuley*, 105 Ark. 439, 151 S. W. 997.

*Illinois*.—*Strawn v. Strawn*, 46 Ill. 412; *Kilgour v. Crawford*, 51 Ill. 249; *Lilly v. Shaw*, 59 Ill. 72; *Stempel v. Thomas*, 89 Ill. 146; *Cowdrey v. Hitchcock*, 103 Ill. 262; *Stunz v. Stunz*, 131 Ill. 210, 23 N. E. 407; *Habberton v. Habberton*, 156 Ill. 444, 41 N. E. 222; *Hartwell v. De Vault*, 159 Ill. 325, 42 N. E. 789; *Metheny v. Bohn*, 164 Ill. 495, 45 N. E. 1011; *Dunn v. Berkshire*, 175 Ill. 243, 51 N. E. 770; *Bliss v. Seeley*, 191 Ill. 461, 61 N. E. 524; *McMullen v. Reynolds*, 209 Ill. 504, 70 N. E. 1041, *reversing* 105 Ill. App. 386; *Wachter v. Doerr*, 210 Ill. 242, 71 N. E. 401; *Jones v. Young*, 228 Ill. 374, 81 N. E. 1042; *Mulloy v. Mulloy*, 231 Ill. 285, 83 N. E. 158; *Shortz v. Ruttiger*, 249 Ill. 494, 94 N. E. 181. See also *Gehrke v. Gehrke*, 190 Ill. 166, 60 N. E. 59. But also *Elser v. Heinzer*, 37 Ill. App. 298; *Loveland v. Loveland*, 96 Ill. App. 488; *Case v. Case*, 103 Ill. App. 177; *Berger v. Neville*, 117 Ill. App. 72.

*Indiana*.—*Bell v. Shaffer*, 151 Ind. 413, 56 N. E. 217; *Osborne v. Eslinger*, 155 Ind. 351, 58 N. E. 439, 80 Am. St. Rep. 240; *St. Clair v. Marquell*, 161 Ind. 56, 67 N. E. 693. And see *Hutts v. Martin*, 134 Ind. 587, 33 N. E. 676.

*Iowa*.—*McClain v. McClain*, 52 Ia. 272, 3 N. W. 60; *Duncan v. Duncan*, 63 Ia. 150, 18 N. W. 858; *Everett v.*

*Croskrey*, 101 Ia. 17, 69 N. W. 1125; *Finch v. Garrett*, 102 Ia. 381, 71 N. W. 429; *Convey v. Murphy*, 154 Ia. 421, 134 N. W. 1065; *Kuhn v. Downs*, 136 N. W. 199.

*Kentucky*.—*Bailey v. Barclay*, 109 Ky. 636, 60 S. W. 377; *Fristoe v. Gillen*, 80 S. W. 823, 26 Ky. L. Rep. 149; *Hemingray v. Hemingray*, 96 S. W. 574, 29 Ky. L. Rep. 879; *Lang v. Constance*, 46 S. W. 693. See also *Thirlwell v. Campbell*, 11 Bush 163; *Abert v. Taylor*, 37 S. W. 676.

*Massachusetts*.—See *Symonds v. Kimball*, 3 Mass. 299; *Swett v. Bussey*, 7 Mass. 503.

*Mississippi*.—*Hoffman v. Smith*, 61 Miss. 544; *Neblett v. Neblett*, 70 Miss. 572, 12 So. 598; *Walker v. Williams*, 84 Miss. 392, 36 So. 450; *Bowles v. Wood*, 90 Miss. 742, 44 So. 169; *Mansfield v. Olsen*, 4 So. 545; *Hardy v. Richards*, 60 So. 643. See also *Potts v. Gray*, 60 Miss. 57.

*Nebraska*.—*Oliver v. Lansing*, 57 Neb. 352, 77 N. W. 802.

*New Jersey*.—*Coles v. Coles*, 13 N. J. Eq. 365; *McMullin v. Doughty*, 69 N. J. Eq. 649, 61 Atl. 265, 68 N. J. Eq. 776, 55 Atl. 115, 284, 64 Atl. 1134.

*Ohio*.—*Young v. Stone*, 55 Ohio St. 125, 45 N. E. 57.

*Pennsylvania*.—*Grubb's Appeal*, 82 Pa. St. 23; *Fidelity Ins. Trust, etc., Co.'s Appeal*, 108 Pa. St. 339; *Biles's Appeal*, 119 Pa. St. 105, 12 Atl. 833.

<sup>3</sup>*Abert v. Taylor*, (Ky.) 37 S. W. 676.



ant's share.<sup>4</sup> In some jurisdictions the allowance of counsel fees in partition, or other equitable proceedings, must be based on an implied or express contract of employment.<sup>5</sup> Where not so based, a reasonable fee is allowed.<sup>6</sup> These general principles are, in effect, those stated in the two preceding sections; partition proceedings being of an equitable nature in all jurisdictions, and in some states cognizable only in a court of equity. In most states this subject is regulated by local laws, which must be consulted. Thus under the California statute where litigation arises between some of the parties to a partition suit, the court may refuse to order the expense of such litigation to be paid by the parties there-to or any of them.<sup>7</sup> The Missouri statute provides, in effect, that the judge of the court in which any partition suit was brought may allow a reasonable fee to the attorney or attorneys bringing the suit, and may in like manner make a reasonable allowance to guardians *ad litem* when appointed, and that the fee and allowance thus made shall be taxed and paid as other costs in the case.<sup>8</sup> The New York code provides that where final judgment, confirming a sale, is rendered, the costs of each party to the action, and the expenses of the sale, including the officer's fees, must be deducted from the proceeds of the sale, and each party's costs must be paid to his attorney.<sup>9</sup> In Tennessee it is, in effect, provided

<sup>4</sup> *Lee v. Lee*, 150 Ia. 611, 130 N. W. 128.

<sup>5</sup> See the preceding section, note. See also *Westmoreland v. Martin*, 24 S. C. 238; *Butler v. Butler*, 73 S. C. 402, 53 S. E. 646; *Legg v. Legg*, 34 Wash. 132, 75 Pac. 130.

<sup>6</sup> *Ellguth v. Ellguth*, 250 Ill. 214, 95 N. E. 169.

*Mode of fixing*, see *McMullen v. Reynolds*, 209 Ill. 504, 70 N. E. 1041, *reversing* 105 Ill. App. 386.

<sup>7</sup> *Watson v. Sutro*, 103 Cal. 169, 37 Pac. 201.

<sup>8</sup> Rev. Stat. 1879, § 3389, Rev. Stat. 1899, §§ 7182, 7183, Rev. Stat. 1899, § 4422. See also *Draper v. Draper*, 29 Mo. 13; *Lucas Bank v. King*, 73 Mo. 590; *Eddie v. Eddie*, 138 Mo. 599, *Attys. at L. Vol. II.—54.*

39 S. W. 451; *Appleman v. Appleman*, 140 Mo. 309, 41 S. W. 794, 62 Am. St. Rep. 732; *Gulick v. Huntley*, 144 Mo. 241, 46 S. W. 154; *Padgett v. Smith*, 206 Mo. 303, 103 S. W. 943; *Donaldson v. Allen*, 213 Mo. 293, 111 S. W. 1128, 127 Am. St. Rep. 601; *Zellee v. Bobb*, 13 Mo. App. 581; *Frank v. Crawford*, 14 Mo. App. 599; *Whitsett v. Wamaack*, 95 Mo. App. 296, 69 S. W. 24; *Forsee v. McGuire*, 109 Mo. App. 701, 83 S. W. 548; *Liles v. Liles*, 116 Mo. App. 413, 91 S. W. 983, 129 Mo. App. 117, 107 S. W. 1111.

<sup>9</sup> N. Y. Code Civ. Pro. § 1579. See also *Cooper v. Cooper*, 27 Misc. 595, 59 N. Y. S. 86, *affirmed* 51 App. Div. 595, 64 N. Y. S. 901; *Sprague v. En-*

by statute that in all partition cases the court may, in its discretion, order the fees of the attorneys for both parties to the suit to be paid out of the common fund when the property is sold for partition, and to be taxed as costs when the property is divided in kind among the parties entitled thereto.<sup>10</sup>

*Allowance of Counsel Fees in Legal Proceedings.*

§ 480. **Generally.** — As a general rule counsel fees cannot be recovered by either party in legal proceedings;<sup>11</sup> thus it has been held that the plaintiff's counsel fees in actions for libel or slander cannot be taken into consideration as an element in determining the amount of damages to be awarded,<sup>12</sup> for the reason that such fees are too remote and contingent.<sup>13</sup> In Connecticut and Ohio, a contrary rule is recognized; and, in those states, it is held that, in estimating the damages to be awarded in libel or slander suits,

gellbrecht, 29 Misc. 464, 61 N. Y. S. 952; *Christy v. Christy*, 6 Paige (N. Y.) 170; *Whittimore v. Whittimore*, 7 Paige (N. Y.) 38.

<sup>10</sup> *Pate v. Maples*, (Tenn.) 43 S. W. 740; *Johnson v. Johnson*, (Tenn.) 53 S. W. 226.

<sup>11</sup> In *Day v. Woodworth*, 13 How. 363, 14 U. S. (L. ed.) 181, the court said: "In many civil actions, such as libel, slander, seduction, etc., the wrong done to the plaintiff is incapable of being measured by a money standard; and the damages assessed depend on the circumstances, showing the degree of moral turpitude or atrocity of the defendant's conduct, and may properly be termed exemplary or vindictive rather than compensatory. . . . It is true that damages assessed by way of example may thus indirectly compensate the plaintiff for money expenses in counsel fees, but the amount of these fees cannot be taken as the measure of

punishment or a necessary element in its infliction."

<sup>12</sup> *Indiana*.—*Indianapolis Journal Newspaper Co. v. Pugh*, 6 Ind. App. 510, 33 N. E. 991; *Grotius v. Ross*, 24 Ind. App. 543, 57 N. E. 46.

*Iowa*.—*Irlbeck v. Bierle*, 84 Ia. 47, 50 N. W. 36.

*Michigan*.—*Warren v. Ray*, 155 Mich. 91, 16 Ann. Cas. 513, 118 N. W. 741, 130 Am. St. Rep. 566.

*Nevada*.—See *Thompson v. Powning*, 15 Nev. 195.

*New York*.—*Hicks v. Foster*, 13 Barb. 663. See also *Halstead v. Nelson*, 24 Hun 395.

*Texas*.—*Landa v. Obert*, 45 Tex. 539.

<sup>13</sup> *Langston Monotype Mach. Co. v. Mergenthaler Linotype Co.*, 147 Fed. 871, *affirmed* 154 Fed. 42, 83 C. C. A. 154; *Hicks v. Foster*, 13 Barb. (N. Y.) 663; *Landa v. Obert*, 45 Tex. 539.

the jury may take into consideration the counsel fees of the plaintiff.<sup>14</sup>

So, also, it has been held that attorney fees cannot be recovered in actions on appeal bonds merely stipulating for the payment of damages,<sup>15</sup> although it would seem that the bond might be so worded as to include attorney fees. In Alabama, however, counsel fees are considered as part of the damages which may be recovered in an action on an appeal bond, even though there is no special stipulation therefor.<sup>16</sup> In a number of jurisdictions counsel fees are allowed to the successful party in proceedings for contempt of court.<sup>17</sup> Though apparently warranted by sound

<sup>14</sup> *Wynne v. Parsons*, 57 Conn. 73, 17 Atl. 362; *Stevens v. Handly*, *Wright* (Ohio) 121; *Sexton v. Todd*, *Wright* (Ohio) 316; *Finney v. Smith*, 31 Ohio St. 529, 27 Am. Rep. 524.

<sup>15</sup> *California*.—*Kellogg v. Howes*, 93 Cal. 586, 29 Pac. 230.

*Colorado*.—*Williams v. Fidelity, etc., Co.*, 42 Colo. 118, 15 Ann. Cas. 722, 93 Pac. 1119.

*Illinois*.—*Litchfield First Nat. Bank v. Fidelity, etc., Co.*, 106 Ill. App. 367.

*Indiana*.—*Noll v. Smith*, 68 Ind. 188.

*Kansas*.—*Deisher v. Gehre*, 45 Kan. 583, 26 Pac. 3; *Hughan v. Grimes*, 62 Kan. 258, 62 Pac. 326; *Barratt v. Grimes*, 10 Kan. App. 181, 63 Pac. 272.

*Kentucky*.—*Welch v. Welch*, 106 Ky. 406, 50 S. W. 687; *Turner v. Johnson*, 106 Ky. 460, 50 S. W. 675.

*South Carolina*.—*Chillicothe First Nat. Bank v. McSwain*, 93 S. C. 30, 75 S. E. 1106.

<sup>16</sup> See *Drake v. Webb*, 63 Ala. 596; *Miller v. Vaughan*, 78 Ala. 323; *Shows v. Pendry*, 93 Ala. 248, 9 So. 462; *Simmons v. Sharp*, 2 Ala. App. 385, 56 So. 849; *Wheeler v. Fuller*, 4 Ala. App. 532, 58 So. 792.

<sup>17</sup> *Doubleday v. Sherman*, 8 Blatchf. 45, 7 Fed. Cas. No. 4020; *Durant v. Washington County*, Woolw. 377, 8 Fed. Cas. No. 4191; *In re Tift*, 11 Fed. 463; *Stahl v. Ertel*, 62 Fed. 920; *William Rogers Mfg. Co. v. Rogers*, 38 Conn. 121; *State v. District Ct.* 113 Minn. 304, 129 N. W. 583; *Copeland-Chatterton Co. v. Business Systems*, 10 Ont. W. Rep. 92; *Reg. v. Ellis*, 32 N. Bruns. 561, 713; *Reg. v. Wilkinson*, 41 U. C. Q. B. 42.

In *New York* expenses actually incurred for counsel have been held properly included in the fine, under a statute relating to punishment for contempt of court which provides that a fine shall be imposed "sufficient to indemnify the injured party for the loss and injury produced by the misconduct, and sufficient to satisfy costs and expenses." *Davis v. Sturtevant*, 4 Duer 148; *People v. Rochester & S. L. R. Co.* 76 N. Y. 294, *affirming* 14 Hun 371; *Brett v. Brett*, 33 Hun 547, *affirmed* 98 N. Y. 619; *Whitman v. Haines*, 51 Hun 640 mem., 4 N. Y. S. 48, *affirmed* 119 N. Y. 639, 23 N. E. 1148; *Van Valkenburgh v. Doolittle*, 4 Abb. N. Cas. 72; *Fitzsimmons v. Ryan*, 64 App. Div. 404, 72 N. Y. S. 65; *Dollard v. Koronsky*,

considerations of policy, such allowance is ordinarily denied in taxpayers' actions.<sup>18</sup>

Recent years, however, have shown the development of a tendency on the part of legislators to allow counsel fees by way of penalty or additional damages. The power to do so seems to be beyond question, providing, of course, that constitutional safeguards are complied with. Thus it has been held that counsel fees may be allowed by statute to a successful plaintiff in well-defined classes of cases, even though no such allowance is made to the defendant in the event of his prevailing in the action,<sup>19</sup> a common illustration being the foreclosure of mechanic's liens.<sup>20</sup>

64 Misc. 611, 118 N. Y. S. 922. See also *Dejonge v. Brenneman*, 23 Hun 332; *Fall Brook Coal Co. v. Hecksher*, 42 Hun 534, 4 N. Y. St. Rep. 657; *Ross v. LaCagnina*, 68 Misc. 497, 124 N. Y. S. 753. Compare *People v. Jacobs*, 5 Hun 428, affirmed 66 N. Y. S. 8; *Power v. Athens*, 19 Hun 165; *People v. Cooper*, 20 Hun 486; *King v. Flynn*, 37 Hun 329; *Stubbs v. Ripley*, 39 Hun 626; *In re Morris*, 45 Hun 167, 10 N. Y. St. Rep. 50; *People v. Compton*, 1 Duer 512; *People v. Elmer*, 3 Paige 85; *Chapman v. Munson*, 3 Paige 347; *Fenlon v. Dempsey*, 22 Abb. N. Cas. 114, 2 N. Y. S. 763; *Sudlow v. Knox*, 4 Abb. Dec. 326, 7 Abb. Pr. N. S. 411; *Matter of Jacobs*, 49 How. Pr. 370; *Weill v. Weill*, 18 Civ. Pro. 241, 10 N. Y. S. 627; *Guerrier v. Coleman*, 135 App. Div. 46, 119 N. Y. S. 895.

A similar statute has been similarly construed in *Utah* and in *Wisconsin*. *Davidson v. Munsey*, 29 Utah 181, 80 Pac. 743; *My Laundry Co. v. Schmeling*, 129 Wis. 597, 109 N. W. 540.

In *Iowa* and *Kansas* an attorney's fee is provided for by statute in prosecutions for contempt under the pro-

hibitory liquor law. *Lingelbach v. Hobson*, 130 Ia. 488, 107 N. W. 168; *State v. Durein*, 46 Kan. 695, 27 Pac. 148.

In *New Jersey* counsel fees in contempt proceedings have been held not to be properly taxable. *O'Rourke v. Cleveland*, 49 N. J. Eq. 577, 25 Atl. 367, 31 Am. St. Rep. 719.

<sup>18</sup> In the absence of statutory authority, the plaintiff in a taxpayer's suit, though successful, can have no allowance made him for counsel fees. *Marion County v. Rives*, 133 Ky. 477, 118 S. W. 309; *Brundige v. Ashley*, 62 Ohio St. 526, 57 N. E. 226; *Criswell v. Everett School District No. 24*, 34 Wash. 420, 75 Pac. 984.

However, in the case of *Kimble v. Franklin County*, 32 Ind. App. 377, 66 N. E. 1023, it was held that a taxpayer who had recovered for and collected for the county sums of money illegally appropriated by officers might be allowed his expenses, including the fees of his attorneys.

<sup>19</sup> *Engelbretsen v. Gay*, 158 Cal. 30, Ann. Cas. 1912A 690, 109 Pac. 880, 28 L.R.A.(N.S.) 1062.

<sup>20</sup> *Shaw v. Martin*, 20 Idaho 168, 117 Pac. 853; *Todd v. Howell*, 47 Ind. App. 665, 95 N. E. 279; *Fisher*

A statute which allowed an attorney fee to a successful plaintiff in an action against a railroad company for damages by fire caused by the operating of a railroad, has been upheld on the ground that it was a reasonable regulation to secure the prevention of such fires, and not merely a provision to secure the payment of the debt.<sup>1</sup> So, a statute which imposed a liability for injury to livestock on unfenced railroads and, in addition to other damages, permitted the recovery of a reasonable attorney fee, was held to be a valid exercise of the state police power.<sup>2</sup> And a statute which provided, in substance, that it should be the duty of the court to allow the plaintiff a reasonable attorney fee, in addition to a claim for wages, whenever a mechanic, artisan, miner, laborer, servant, or other employee, should have cause to bring a suit for wages, and should establish his claim and show that a demand had been made in writing for the amount due, has also been held to be constitutional as embracing a well-defined class of cases and persons for a basis.<sup>3</sup>

Where, however, a statute imposes an attorney fee in such a manner as to offend against constitutional requirements it will, of course, be invalid.<sup>4</sup> Thus it has been held that a statute providing for the recovery by the plaintiff, in an action for personal services rendered by a laborer, clerk, servant, nurse, or other person, of an attorney's fee, is in conflict with the Fourteenth Amendment to the Federal Constitution, in that it denies to the defendant the equal protection of the law.<sup>5</sup> And as to a statute which pro-

*r. Independent School Dist.* 154 Ia. 125, 134 N. W. 545. And see *Romona Oilitic Stone Co. v. Weaver*, 49 Ind. App. 368, 97 N. E. 441; *Anderson v. Donahue*, 116 Minn. 380, 133 N. W. 975; *Lindquist v. Young*, 119 Minn. 219, 138 N. W. 28. See, however, for cases disallowing fee, *Sattler v. Knapp*, 60 Ore. 466, 120 Pac. 2; *Hughes v. Flint*, 61 Wash. 460, 112 Pac. 633.

<sup>1</sup> *Atchison, T. & S. F. R. Co. v. Matthews*, 174 U. S. 96, 19 S. Ct. 609, 43 U. S. (L. ed.) 909.

<sup>2</sup> *Illinois Cent. R. Co. v. Crider*, 91 Tenn. 489, 19 S. W. 618. See also

*Terre Haute, etc., R. Co. v. Salmon*, 161 Ind. 131, 67 N. E. 918.

<sup>3</sup> *Vogel v. Pekoe*, 157 Ill. 339, 42 N. E. 386, 30 L.R.A. 491.

<sup>4</sup> *Gulf, etc., R. Co. v. Ellis*, 165 U. S. 150, 17 S. Ct. 255, 41 U. S. (L. ed.) 666.

<sup>5</sup> *Chicago, etc., R. Co. v. Mashore*, 21 Okla. 275, 17 Ann. Cas. 277, 96 Pac. 630; *Oligschlager v. Stephenson*, 24 Okla. 760, 104 Pac. 345. And see to the same effect *Hoeking Valley Coal Co. v. Rosser*, 53 Ohio St. 12, 41 N. E. 263, 53 Am. St. Rep. 622, 29 L.R.A. 386.

vided for an attorney fee of ten dollars to any person having a valid claim against railroad corporations for personal services, or labor, or for damages, it was held that the companies specified in the statute were unduly discriminated against as debtors, and that the equal protection of the law was denied them.<sup>6</sup>

The constitutionality of statutes providing for the allowance of an attorney fee for the enforcement of mechanics and kindred liens presents a conflict of opinion. In some states such legislation is deemed to be inoffensive;<sup>7</sup> on the other hand, such statutes have been declared to be unconstitutional in several jurisdictions, either as class legislation, or as amounting to the deprivation of property without compensation or due process of law.<sup>8</sup>

<sup>6</sup> *Gulf, etc., R. Co. v. Ellis*, 165 U. S. 150, 17 S. Ct. 255, 41 U. S. (L. ed.) 666, *reversing* 87, Tex. 19, 26 S. W. 985.

<sup>7</sup> *Alaska*.—*Pioneer Mining Co. v. Delamotte*, 185 Fed. 752, 108 C. C. A. 90.

*Florida*.—*Dell v. Marvin*, 41 Fla. 221, 26 So. 188, 79 Am. St. Rep. 171, 45 L.R.A. 201.

*Idaho*.—*Thompson v. Wise Boy Min., etc., Co.*, 9 Idaho 363, 74 Pac. 958; *Robertson v. Moore*, 10 Idaho 115, 77 Pac. 218; *Nelson Bennett Co. v. Twin Falls Land, etc., Co.*, 14 Idaho 5, 93 Pac. 789.

*Indiana*.—*Duckwall v. Jones*, 156 Ind. 682, 58 N. E. 1055, 60 N. E. 797.

*Montana*.—*Wortman v. Kleinschmidt*, 12 Mont. 316, 30 Pac. 280; *Helena Steam-Heating, etc., Co. v. Wells*, 16 Mont. 65, 40 Pac. 78; *Murray v. Swanson*, 18 Mont. 535, 46 Pac. 441; *Hill v. Cassidy*, 24 Mont. 108, 60 Pac. 811.

*New Mexico*.—*Genest v. Las Vegas Masonic Bldg. Assoc.*, 11 N. M. 251, 67 Pac. 743.

*Oregon*.—*Title Guarantee, etc., Co.*

*v. Wrenn*, 35 Ore. 62, 56 Pac. 271, 76 Am. St. Rep. 454.

*Washington*.—*Griffith v. Maxwell*, 20 Wash. 403, 55 Pac. 571; *Fitch v. Applegate*, 24 Wash. 25, 64 Pac. 147; *Littell v. Saulsberry*, 40 Wash. 550, 82 Pac. 909.

<sup>8</sup> *Alabama*.—*Randolph v. Builders, etc., Supply Co.*, 106 Ala. 501, 17 So. 721; *McAnally v. Hawkins Lumber Co.*, 109 Ala. 397, 19 So. 417.

*Colorado*.—*Davidson v. Jennings*, 27 Colo. 187, 60 Pac. 354, 83 Am. St. Rep. 49, 48 L.R.A. 340; *Antlers Park Regent Min. Co. v. Cunningham*, 29 Colo. 284, 68 Pac. 226; *Sickman v. Wollett*, 31 Colo. 58, 71 Pac. 1107; *Los Angeles Gold Mine Co. v. Campbell*, 13 Colo. App. 1, 56 Pac. 246; *Burleigh Bldg. Co. v. Merchant Brick, etc., Co.*, 13 Colo. App. 455, 59 Pac. 83; *Perkins v. Boyd*, 16 Colo. App. 266, 65 Pac. 350.

*Kansas*.—*Atkinson v. Woodmansee*, 68 Kan. 71, 74 Pac. 640, 64 L.R.A. 325.

*Michigan*.—*Grand Rapids Chair Co. v. Runnels*, 77 Mich. 104, 43 N. W. 1006.

It is true that the foregoing illustrations do not make the subject under discussion as clear as might be desired, but this must frequently be so as to questions of this character. This difficulty is thus stated by the Supreme Court of the United States: "Many cases have been before this court involving the power of state legislatures to impose special duties or liabilities upon individuals and corporations, or classes of them, and while the principles of separation between those cases which have been adjudged to be within the power of the legislature and those beyond its power are not difficult of comprehension or statement, yet their application often becomes very troublesome, especially when a case is near to the dividing line. It is easy to distinguish between the full light of day and the darkness of midnight, but often very difficult to determine whether a given moment in the twilight hour is before or after that in which the light predominates over the darkness. The equal protection of the laws which is guaranteed by the Fourteenth Amendment does not forbid classification. That has been asserted in the strongest language. . . . Neither the amendment—broad and comprehensive as it is—nor any other amendment, was designed to interfere with the power of the state, sometimes termed its 'police power,' to prescribe regulations to promote the health, peace, morals, education, and good order of the people, and to legislate so as to increase the industries of the state, develop its resources, and add to its wealth and prosperity. From the very necessities of society, legislation of a special character, having these objects in view, must often be had in certain districts, such as for draining marshes and irrigating arid plains. Special burdens are often necessary for general benefits—for supplying water, preventing fires, lighting districts, cleaning streets, opening parks, and many other objects. Regulations for these purposes may press with more or less weight upon one than upon another, but they are designed, not to impose unequal or unnecessary restrictions upon any one, but to promote, with as little inconvenience as possible, the general good. Though, in many respects, necessarily special in their character, they do not furnish just ground of complaint if they operate alike upon all persons and property, under the same circumstances and conditions. Class legislation, discriminating against some and favoring others, is prohibited; but legislation which, in carrying out a public pur-

pose, is limited in its application, if within the sphere of its operation it affects alike all persons similarly situated, is not within the amendment."<sup>9</sup>

**§ 481. Proceedings for Collection of Taxes and Assessments.**— In several jurisdictions, under statutory authority, counsel fees are allowed the plaintiff in proceedings for the collection of taxes<sup>10</sup> and local assessments.<sup>11</sup> Statutes of this character have uniformly been held to be constitutional.<sup>12</sup>

**§ 482. In Actions on Injunction Bonds.**— In many jurisdictions the reasonable counsel fees incurred in procuring the dissolution of an injunction, including those for services in the appellate court,<sup>13</sup> are recoverable in an action on the injunction bond,<sup>14</sup>

<sup>9</sup> *Atchison, etc., R. Co. v. Matthews*, 174 U. S. 96, 19 S. Ct. 609, 43 U. S. (L. ed.) 909.

<sup>10</sup> *People v. Seymour*, 16 Cal. 332, 76 Am. Dec. 521; *State v. Kerr*, 8 Mo. App. 125. See also *U. S. Electric Power, etc., Co. v. State*, 79 Md. 63, 28 Atl. 768.

<sup>11</sup> *United States*.—*Cleveland, etc., R. Co. v. Porter*, 210 U. S. 177, 28 S. Ct. 647, 52 U. S. (L. ed.) 1012.

*Arizona*.—*English v. Territory*, 11 Ariz. 259, 90 Pac. 601, *affirming on rehearing* 11 Ariz. 87, 89 Pac. 501, and *affirming* 214 U. S. 359, 29 S. Ct. 658, 53 U. S. (L. ed.) 1030.

*Arkansas*.—*School Dist. v. Board of Improvement*, 65 Ark. 345, 46 S. W. 418.

*California*.—*Gillis v. Cleveland*, 87 Cal. 214, 25 Pac. 351; *Hughes v. Alsip*, 112 Cal. 587, 44 Pac. 1027; *Reid v. Clay*, 134 Cal. 207, 66 Pac. 262; *McCaleb v. Dreyfus*, 156 Cal. 204, 103 Pac. 924; *Engelbrechtsen v. Gay*, 158 Cal. 30, Ann. Cas. 1912A 690, 109 Pac. 880, 28 L.R.A. (N.S.) 1062.

*Indiana*.—*Dowell v. Talbot Paving Co.*, 138 Ind. 675, 38 N. E. 389;

*Pittsburgh, etc., R. Co. v. Fish*, 158 Ind. 525, 63 N. E. 454; *Brown v. Central Bermudez Co.*, 162 Ind. 453, 69 N. E. 150; *Scott v. Hayes*, 162 Ind. 548, 70 N. E. 879; *Pittsburgh, etc., R. Co. v. Taber*, 168 Ind. 419, 11 Ann. Cas. 808, 77 N. E. 741; *Palmer v. Nolting*, 13 Ind. App. 581, 41 N. E. 1045; *Indiana Bond Co. v. Jameson*, 24 Ind. App. 8, 56 N. E. 37; *Cleveland, etc., R. Co. v. Porter*, 38 Ind. App. 226, 74 N. E. 260, 76 N. E. 179.

*Iowa*.—*Tuttle v. Polk*, 84 Ia. 12, 50 N. W. 38; *Tuttle v. Polk*, 92 Ia. 433, 60 N. W. 733.

*Pennsylvania*.—*Ashley v. Smith*, 8 Kulp 60.

*Washington*.—*Montesano v. Blair*, 12 Wash. 188, 40 Pac. 731.

<sup>12</sup> *Engelbrechtsen v. Gay*, 158 Cal. 30, Ann. Cas. 1912A 690, 109 Pac. 880, 28 L.R.A. (N.S.) 1062. And see the cases cited in the two preceding notes.

<sup>13</sup> *Miller v. Donovan*, 13 Idaho 735, 13 Ann. Cas. 259, 92 Pac. 991; *State v. Graham*, 68 W. Va. 1, 69 S. E. 301.

<sup>14</sup> *Alabama*.—*Fidelity, etc., Co. v. Walker*, 158 Ala. 129, 48 So. 600;



especially where the injunction is not the only relief sought;<sup>15</sup> but where the injunction was dissolved below, fees for the services of attorneys to resist its re-establishment on appeal, there being no supersedeas, cannot be recovered on the bond.<sup>16</sup> As a rule, only one reasonable attorney fee will be allowed irrespective of the number of counsel engaged,<sup>17</sup> and that only when the defendant has paid it or become liable therefor.<sup>18</sup>

Counsel fees incurred in the main action, however, cannot be recovered in a suit on the injunction bond;<sup>19</sup> but the defendant is required to show only that the services rendered were performed in securing the dissolution of the injunction, or were performed principally and mainly for that purpose; and the fact that such

Tallassee Falls Mfg. Co. v. Parks, 2 Ala. App. 278, 56 So. 588.

*Kentucky*.—Green v. Quisenberry, 133 Ky. 561, 118 S. W. 361.

*Louisiana*.—Brown v. Lambeth, 2 La. Ann. 822; Williams v. Close, 14 La. Ann. 737; Betts v. Mougin, 15 La. Ann. 52; Rivet v. George M. Murrell Planting, etc., Co., 121 La. 201, 46 So. 210, 126 Am. St. Rep. 320.

*Mississippi*.—Vicksburg Waterworks Co. v. Vicksburg, 99 Miss. 132, 54 So. 852, 33 L.R.A.(N.S.) 844.

*Missouri*.—C. H. Albers Commission Co. v. Spencer, 236 Mo. 608, Ann. Cas. 1912D 705, 139 S. W. 321.

*New York*.—American Exch. Nat. Bank v. Goubert, 67 Misc. 602, 124 N. Y. S. 817, affirmed 146 App. Div. 875, 130 N. Y. S. 1103.

*West Virginia*.—State v. Medford, 34 W. Va. 633, 12 S. E. 864; State v. Corvin, 51 W. Va. 19, 41 S. E. 211; State v. Taylor, 67 W. Va. 585, 68 S. E. 379; State v. Graham, 68 W. Va. 1, 69 S. E. 301.

<sup>15</sup> *Illinois*.—Dempster v. Lansingh, 234 Ill. 381, 84 N. E. 1032, reversing 128 Ill. App. 388.

*Kentucky*.—Burgan v. Sharer, 14

B. Mon. 497; New National Turnpike Co. v. Dulaney, 86 Ky. 518, 6 S. W. 590, 9 Ky. L. Rep. 697; Tyler v. Hamilton, 108 Ky. 120, 55 S. W. 920, 21 Ky. L. Rep. 1516; Bartram v. Ohio, etc., R. Co., 141 Ky. 100, 132 S. W. 188; Graham v. Rice, 110 S. W. 231.

*Louisiana*.—Lee Lumber Co. v. Hotard, 122 La. 850, 48 So. 286, 129 Am. St. Rep. 368.

*Washington*.—Collins v. Huffman, 48 Wash. 184, 93 Pac. 220.

*West Virginia*.—State v. Medford, 34 W. Va. 633, 12 S. E. 864; State v. Corvin, 51 W. Va. 19, 41 S. E. 211; State v. Taylor, 67 W. Va. 585, 68 S. E. 379.

<sup>16</sup> C. H. Albers Commission Co. v. Spencer, 236 Mo. 608, Ann. Cas. 1912D 705, 139 S. W. 321.

<sup>17</sup> Citizens' Trust, etc., Co. v. Ohio Valley Tie Co., 138 Ky. 421, 128 S. W. 317.

<sup>18</sup> Reed v. New York Nat. Exch. Bank, 230 Ill. 50, 82 N. E. 341.

<sup>19</sup> State v. Taylor, 67 W. Va. 585, 68 S. E. 379. See also Collins v. Huffman, 48 Wash. 184, 93 Pac. 220.

services inured to his benefit in the main case, and resulted in a final disposition of the action on the merits, cannot defeat the right to recover attorney fees for services originally and primarily required on account of the injunction.<sup>20</sup>

In several jurisdictions counsel fees are not recoverable in actions on injunction bonds.<sup>1</sup>

**§ 483. In Actions on Attachment Bonds.**— Counsel fees, the payment of which were rendered necessary in procuring the dissolution of a wrongful attachment, may be recovered in several jurisdictions, as a part of the damages sustained, in an action on the attachment bond.<sup>2</sup> Such recovery, however, is limited to de-

<sup>20</sup> *Miller v. Donovan*, 13 Idaho 735, 13 Ann. Cas. 259, 92 Pac. 99.

<sup>1</sup> *United States*.—*Lindeberg v. Howard*, 146 Fed. 467, 8 Ann. Cas. 709, 77 C. C. A. 23.

*Alabama*.—*Tallassee Falls Mfg. Co. v. Parks*, 2 Ala. App. 278, 56 So. 588.

*Georgia*.—*Ball v. Vason*, 56 Ga. 264; *Jones v. Rountree*, 11 Ga. App. 181, 74 S. E. 1096.

*Maine*.—*Barrett v. Bowers*, 87 Me. 185, 32 Atl. 871.

*North Carolina*.—*Midgett v. Vann*, 158 N. C. 128, 73 S. E. 801.

*Oklahoma*.—*Revell v. Smith*, 25 Okla. 508, 106 Pac. 863.

*Texas*.—*Carpenter v. Sour Lake First Nat. Bank*, 53 Tex. Civ. App. 23, 114 S. W. 904.

*Virginia*.—*Wisecarver v. Wisecarver*, 97 Va. 452, 34 S. E. 56.

<sup>2</sup> *United States*.—*L. Bucki, etc., Lumber Co. v. Fidelity, etc., Co.*, 109 Fed. 393, 48 C. C. A. 436.

*Alabama*.—*Marshall v. Betner*, 17 Ala. 832; *Seay v. Greenwood*, 21 Ala. 491; *Roberts v. Heim*, 27 Ala. 678; *Higgins v. Mansfield*, 62 Ala. 267; *Dothard v. Sheid*, 69 Ala. 135; *Flournoy v. Lyon*, 70 Ala. 308; *Vandiver*

*v. Waller*, 143 Ala. 411, 39 So. 136.

*Florida*.—*Gonzales v. De Funiak Havana Tobacco Co.*, 41 Fla. 471, 26 So. 1012.

*Georgia*.—*Cincinnati Fourth Nat. Bank v. Mayer*, 96 Ga. 728, 24 S. E. 453.

*Iowa*.—*Vorse v. Phillips*, 37 Ia. 428; *Selz v. Belden*, 48 Ia. 451; *Schnitker v. Schnitker*, 109 Ia. 349, 80 N. W. 403.

*Kansas*.—*Gregory Grocery Co. v. Beaton*, 10 Kan. App. 256, 62 Pac. 732.

*Louisiana*.—*Offut v. Edwards*, 9 Rob. 90; *Phelps v. Coggeshall*, 13 La. Ann. 440; *Brandon v. Allen*, 28 La. Ann. 60; *Barrimore v. McFeely*, 32 La. Ann. 1179; *State Bank v. Martin*, 52 La. Ann. 1628, 28 So. 130; *Southern Grocer Co. v. Adams*, 112 La. 60, 36 So. 226; *Wall v. Hardwood Mfg. Co.*, 127 La. 959, 54 So. 300.

*Mississippi*.—*Buckley v. Van Diver*, 70 Miss. 622, 12 So. 905; *Dunlap v. Fox*, 2 So. 169.

*Missouri*.—*State v. Beldsmeier*, 56 Mo. 226; *State v. Gage*, 52 Mo. App. 464; *State v. Parsons*, 109 Mo. App. 432, 84 S. W. 1019.

*Montana*.—*Plymouth Gold Min.*

fending against the attachment proceedings, and does not include fees for defending the suit on the merits,<sup>3</sup> or for the services rendered in prosecuting the suit for damages for the wrongful attachment.<sup>4</sup> Nor can there be any recovery for the fees of counsel whose services were unnecessary.<sup>5</sup>

In some jurisdictions the counsel fees expended in resisting a wrongful attachment are not an element of damages for which the attachment plaintiff is liable,<sup>6</sup> excepting, possibly, where the attachment was sued out through malice and without probable cause.<sup>7</sup>

### *Taxable Costs, Statutory Fees, and Expenses.*

**§ 484. To Whom Taxable Costs and Statutory Fees Belong.**—Under statutes prevailing in many jurisdictions certain costs, or nominal attorney fees, are taxed in favor of the success-

Co. v. U. S. Fidelity, etc., Co., 35 Mont. 23, 10 Ann. Cas. 951, 88 Pac. 565.

*Nebraska*.—Raymond v. Green, 12 Neb. 215, 10 N. W. 709, 41 Am. Rep. 763.

*New Mexico*.—Territory v. Rindskopf, 5 N. M. 93, 20 Pac. 180.

*New York*.—Tyng v. American Surety Co., 174 N. Y. 166, 66 N. E. 668; Epstein v. U. S. Fidelity, etc., Co., 29 Misc. 295, 60 N. Y. S. 527.

<sup>3</sup> Elwell v. Seattle Scandinavian Fish Co., 2 Alaska 617; Gonzales v. De Funiak Havana Tobacco Co., 41 Fla. 471, 26 So. 1012; Porter v. Knight, 63 Ia. 365, 19 N. W. 282; Byford v. Girton, 90 Ia. 661, 57 N. W. 588; State v. Fargo, 151 Mo. 282, 52 S. W. 199; State v. McHale, 16 Mo. App. 478; Fry v. Estes, 52 Mo. App. 1; State v. Parsons, 109 Mo. App. 432, 84 S. W. 1019.

<sup>4</sup> Vorse v. Phillips, 37 Ia. 428; Offutt v. Edwards, 9 Rob. (Ia.) 90; Roach v. Brannon, 57 Miss. 490; Chil-

licothe First Nat. Bank v. McSwain, 93 S. C. 30, 75 S. E. 1106.

<sup>5</sup> Trammell v. Ramage, 97 Ala. 666, 11 So. 916; New Sharon Creamery Co. v. Knowlton, 132 Ia. 672, 108 N. W. 770; Roach v. Brannon, 57 Miss. 490; Rambaut v. Irving Nat. Bank, 42 App. Div. 143, 58 N. Y. S. 1056.

<sup>6</sup> Patton v. Garrett, 37 Ark. 613; Mitchell v. Mattingly, 1 Met. (Ky.) 237; Worthington v. Morris, 98 Ky. 54, 32 S. W. 269; Farmers' etc. Tobacco Warehouse Co. v. Gibbons, 107 Ky. 611, 55 S. W. 2; Stringfield v. Hirsch, 94 Tenn. 425, 29 S. W. 609, 45 Am. St. Rep. 733; Craddock v. Goodwin, 54 Tex. 578; Yarbrough v. Weaver, 6 Tex. Civ. App. 215, 25 S. W. 468; Strauss v. Dundon, (Tex.) 27 S. W. 503.

<sup>7</sup> Abolosh v. Buck, (Ky.) 43 S. W. 425; Hughes v. Brooks, 36 Tex. 379; McGill v. Fuller, 45 Wash. 615, 88 Pac. 1038. See also Juchter v. Boehm, 67 Ga. 534.

ful party; these, as a general rule, are held to belong to the client,<sup>8</sup> providing, of course, that he appears by attorney. Clients appearing in person are not entitled to the statutory attorney fees.<sup>9</sup>

In some states, however, certain taxable costs and statutory fees are held to be the property of the attorney of record,<sup>10</sup> whose right thereto cannot be affected by the employment of other counsel to

<sup>8</sup> *United States*.—Celluloid Mfg. Co. v. Chandler, 27 Fed. 9.

*Arkansas*.—Bostick v. Cox, 28 Ark. 566.

*Florida*.—Girtman v. Starbuck, 48 Fla. 265, 5 Ann. Cas. 833, 37 So. 731.

*Illinois*.—Cheney v. Ricks, 168 Ill. 533, 48 N. E. 75.

*Maine*.—Clay v. Moulton, 70 Me. 315.

*Massachusetts*.—Dwyer v. Ells, 208 Mass. 195, 21 Ann. Cas. 1042, 94 N. E. 286.

*Minnesota*.—Davis v. Swedish-American Nat. Bank, 78 Minn. 408, 80 N. W. 953, 81 N. W. 210, 79 Am. St. Rep. 400.

*Missouri*.—Frissell v. Haile, 18 Mo. 18.

*New Jersey*.—Ely v. Peet, 52 N. J. Eq. 734, 29 Atl. 817.

*New York*.—Barry v. Third Ave. R. Co., 87 App. Div. 543, 84 N. Y. S. 830; McIlvaine v. Steinson, 90 App. Div. 77, 85 N. Y. S. 889; Earley v. Whitney, 106 App. Div. 399, 94 N. Y. S. 728; Caecia v. Isecke, 123 App. Div. 779, 108 N. Y. S. 542; Wheaton v. Newcombe, 48 Super. Ct. 215; Ward v. Syme, 1 Code Rep. N. S. 208; Martin v. Kanouse, 11 How. Pr. 567, 2 Abb. Pr. 327. Prior to the enactment of the Code of Civil Procedure, costs were held to belong to the attorney. Tunstall v. Winton, 31 Hun 219; In re Bailey, 31 Hun 608; People v. Buffalo, 7 Misc. 386,

28 N. Y. S. 158; Guliano v. Whitenack, 9 Misc. 562, 24 Civ. Pro. 55, 1 N. Y. Ann. Cas. 75, 30 N. Y. S. 415; Arend v. Cottle, 13 Misc. 612, 34 N. Y. S. 913; Kult v. Nelson, 25 Misc. 238, 55 N. Y. S. 56, *modifying* 24 Misc. 20, 53 N. Y. S. 95; In re Bailey, 5 Civ. Pro. 253; Kipp v. Rapp, 2 How. Pr. N. S. 169, 7 Civ. Pro. 385; Robbins v. Alexander, 11 How. Pr. 100; Adams v. Niagara, etc., Co., 10 N. Y. Ann. Cas. 401, 74 N. Y. S. 485.

*Vermont*.—See Moore v. Jones, 23 Vt. 739, 17 Fed. Cas. No. 9,768.

*Wisconsin*.—Yorton v. Milwaukee, etc., R. Co., 62 Wis. 367, 21 N. W. 516, 23 N. W. 401.

*Canada*.—Beaudin v. Montreal, 20 Quebec Super. Ct. 32.

<sup>9</sup> Goodyear Dental Vulcanite Co. v. Osgood, 13 Pat. Off. Gaz. 325, 2 B. & A. Pat. Cas. 529, 10 Fed. Cas. No. 5,594; Gorse v. Parker, 36 Fed. 840; Bacon v. Combes, 32 Misc. 704, 65 N. Y. S. 510; Kopper v. Willis, 9 Daly (N. Y.) 460; Stewart v. New York C. Pl., 10 Wend. (N. Y.) 597; People v. Steuben C. Pl., 12 Wend. (N. Y.) 200; Verplanck v. Mercantile Ins. Co., 1 Edw. (N. Y.) 46.

<sup>10</sup> Gillis v. Holly, 19 Ala. 663; Pittsburgh v. O'Brien, 239 Pa. St. 60, 86 Atl. 651; Delaware Ins. Co. v. Gilpin, 1 Bin. (Pa.) 501; Hamilton v. Hamilton, 10 Pa. Co. Ct. 255.

assist him in the performance of his duties.<sup>11</sup> So, the client may agree that the statutory fees shall go to his attorney.<sup>12</sup>

A usage whereby statutory fees were conceded to belong to the attorney will be given due weight in construing a statute which leaves the question of the ownership of such fees in doubt;<sup>13</sup> but it was held in a federal court that a usage existing in a district in which suit was brought, for the attorney of the successful party to take statutory fees, is not binding upon a litigant who lives in a district where such a usage does not exist, and who has no knowledge thereof.<sup>14</sup>

An attorney who conducts his own litigation is entitled to the statutory fees.<sup>15</sup> The reason for making this distinction between parties who are attorneys and those who are not, is that when the party is an attorney he gives the professional time, knowledge, and experience in the conducting or defense of his suit, which he would otherwise have to pay another attorney for rendering. It can make no difference to the defeated party, who is by law bound to pay the costs of the attorney of the prevailing party, whether that attorney is the party himself or another attorney employed by him. He, like any other lawyer, is paid for his time and services, and if he renders them in the management and trial of his own cause, it may amount to as much pecuniary loss or damage to him

<sup>11</sup> *People v. Buffalo*, 7 Misc. 386, 28 N. Y. S. 158.

<sup>12</sup> *Ely v. Cooke*, 28 N. Y. 365; *Roberts v. Carter*, 9 Abb. Pr. (N. Y.) 366 note; *Harris v. Cuff*, 15 Civ. Pro. 104, 1 N. Y. S. 349. See also *Rooney v. Second Ave. R. Co.*, 18 N. Y. 368; *McIlvaine v. Steinson*, 90 App. Div. 77, 85 N. Y. S. 889; *Taylor v. Long Island R. Co.*, 25 Misc. 11, 53 N. Y. S. 830; *Roberts v. Carter*, 9 Abb. Pr. (N. Y.) 366 note; *Robbins v. Alexander*, 11 How. Pr. (N. Y.) 100.

<sup>13</sup> *Gillis v. Holly*, 19 Ala. 663.

<sup>14</sup> *Celluloid Mfg. Co. v. Chandler*, 27 Fed. 9.

<sup>15</sup> *England*.—*Gugy v. Brown*, L. R. 1 P. C. 411; *In re Donaldson*, 27 Ch. D.

544, 54 L. J. Ch. 151, 51 L. T. N. S. 622; *London Scottish Ben. Soc. v. Chorley*, 13 Q. B. D. 872, 53 L. J. Q. B. 551, 51 L. T. N. S. 100, 32 W. R. 781. See *Parsloe v. Foy*, 2 Dowl. 181; *Jervis v. Dewes*, 4 Dowl. 764.

*Compare Leaver v. Whalley*, 2 Dowl. 80.

*Canada*.—*Banks v. Burroughs*, 12 Quebec Super Ct. 184.

*New Jersey*.—*Flaacke v. Jersey City*, 33 N. J. Eq. 57; *Drake v. Berry*, 42 N. J. L. 60.

*New York*.—*Crommelin v. Dinsmore*, 1 N. Y. City Ct. 69; *Kopper v. Willis*, 9 Daly 460; *Willard v. Harbeck*, 3 Den. 260.

as if he paid another attorney for doing it.<sup>16</sup> It has been held, however, that an attorney acting for himself in partition proceedings is not entitled to the statutory fee allowed in such cases.<sup>17</sup>

The allowance of counsel fees in certain legal and equitable proceedings has been considered in the two preceding subdivisions of this chapter.<sup>18</sup>

**§ 485. Taxable Costs and Statutory Fees as Measure of Attorney's Compensation.** — In England the fees of legal practitioners below the degree of counsel are fixed by statute;<sup>19</sup> and in New York, prior to the enactment of the Code of Civil Procedure, the taxable costs and statutory fees were taken to be the measure of the attorney's compensation in the absence of any agreement with the client to the contrary.<sup>20</sup>

At the present time, however, attorneys are not confined to the amount allowed as statutory fees or taxable costs for which the adverse party is liable; but they may charge, and contract for, reasonable compensation in every jurisdiction in the United States.<sup>21</sup>

<sup>16</sup> *Kopper v. Willis*, 9 Daly (N. Y.) 460.

<sup>17</sup> *Girtman v. Starbuck*, 48 Fla. 265, 5 Ann. Cas. 833, 37 So. 731; *Cheney v. Ricks*, 168 Ill. 533, 48 N. E. 75. See also *supra*, § 479.

<sup>18</sup> See *supra*, §§ 477-483.

<sup>19</sup> See *supra*, § 401. See also 2 Halsbury's Laws of England, pp. 403-409.

<sup>20</sup> *Crotty v. McKenzie*, 42 Super. Ct. (N. Y.) 192; *McFarland v. Crary*, 8 Cow. (N. Y.) 253; *Wallis v. Loubat*, 2 Den. (N. Y.) 607; *Keenan v. Dorfinger*, 19 How. Pr. (N. Y.) 153; *Adams v. Fox*, 27 How. Pr. (N. Y.) 409; *Scott v. Elmendorf*, 12 Johns. (N. Y.) 315; *In re Bleakley*, 5 Paige (N. Y.) 311; *Adams v. Stevens*, 26 Wend. (N. Y.) 451; *Caccia v. Isecke*, 123 App. Div. 779, 108 N. Y. S. 542.

<sup>21</sup> *United States*.—*In re Pashal*, 10 Wall. 483, 19 U. S. (L. ed.) 992.

*Florida*.—*Carter v. Bennett*, 6 Fla. 214.

*Georgia*.—*May v. Sibley*, 69 Ga. 133.

*New Hampshire*.—*Smith v. Davis*, 45 N. H. 566.

*New Jersey*.—*Strong v. Mundy*, 52 N. J. Eq. 833, 31 Atl. 611.

*New York*.—*Gallup v. Perue*, 10 Hun 525; *People v. Fulton County*, 53 Hun 254, 6 N. Y. S. 591; *Garfield v. Kirk*, 65 Barb. 464; *Sanford v. Ruckman*, 24 How. Pr. 521; *Adams v. Fox*, 27 How. Pr. 409; *Mygatt v. Willcox*, 1 Laus. 55; *Garr v. Mairat*, 1 Hilt. 498; *Phenix v. Romer*, 1 Edm. Sel. Cas. 353; *Adams v. Stevens*, 26 Wend. 451; *McFarland v. Crary*, 8 Cow. 253; *Richardson v. Brooklyn, etc., R. Co.*, 15 Abb. Pr. 342 note; *Scott v. Elmendorf*, 12 Johns. 315; *In re Shanley*, 57 Misc. 8, 107 N. Y. S. 913, modified 124 App. Div. 935, 109 N. Y. S. 434;

This subject has been more fully considered heretofore.<sup>1</sup> There may be cases, of course, wherein the taxable costs and statutory fees would be reasonable compensation;<sup>2</sup> indeed, there may be instances in which such an allowance would be exorbitant.<sup>3</sup>

The allowance of taxable costs is to punish a party for putting his adversary to unnecessary trouble and expense, and, in so far as it serves that purpose, is commendable. The allowance of statutory fees is intended to serve a similar purpose—that is, a sort of penalty which the losing party must pay. It must be conceded, however, that if statutory fees were intended to relieve the successful litigant from the burden of counsel fees, they have fallen

*Morey v. Schuster*, 81 Misc. 515, 142 N. Y. S. 1054.

*Ohio*.—*McDonald v. Page*, Wright 121.

*Pennsylvania*.—*Brackenridge v. McFarlane*, 1 Add. 49; *Foster v. Jack*, 4 Watts 334.

*Tennessee*.—*Newman v. Washington*, 1 Mart. & Y. 81.

*Virginia*.—*Major v. Gibson*, 1 Patt. & H. 48.

<sup>1</sup> See *supra*, §§ 404, 405; 417–438.

<sup>2</sup> See *Caccia v. Iseeke*, 123 App. Div. 779, 108 N. Y. S. 542.

<sup>3</sup> See *Starin v. New York*, 106 N. Y. 82, 12 N. E. 643, wherein it appears that an attorney was employed by the city of New York to bring over fourteen thousand actions for violations of the excise law, and the court, in denying the right of the attorney to retain as compensation all costs awarded in the cases, said: "The result arrived at by the referee ought to shock the common sense of every intelligent man. The idea that a lawyer of respectable character could by any possibility earn over three hundred thousand dollars in the space of four or five years, by services of a legal nature requiring no more legal ability than was involved in making out a

summons and complaint and taking judgments by default in these excise cases, is a delusion simply, and any judicial tribunal that should determine it to be a fact would be absurdly at war with the truth and the common universal experience of mankind. As I have said, the testimony of plaintiff's witnesses seems to have been based upon the assumed law that if no bargain were made, the attorney was entitled to the taxable costs in every case. As a mere measure of compensation for services as an attorney, performed in an ordinary case or in a very small number of such cases, that rule may be very well and may furnish, under such circumstances, a fair rate of compensation. But upon a question of compensation for services performed in an enormous number of cases involving no complicated questions of law, and often the most simple of all questions of fact, taxable costs granted in each case as a measure of compensation would make it most grossly excessive. I do not think there is, in truth, any general rule of law that, since the code, makes the compensation of the attorney necessarily coextensive with the taxable costs in the absence of an agreement."

far short of the mark. They are entirely too meager for that purpose; and the same may be said of costs taxed in the nature of fees. It would seem that the imposition of a reasonable attorney fee on the losing party might, in some cases at least, inure to the public good, but the usual statutory allowance is so inadequate that it cannot be said to serve any useful purpose.

§ 486. **Reimbursement of Expenses.**—An attorney at law is authorized, in conducting his client's affairs, to incur certain expenses in the client's behalf.<sup>4</sup> Such expenditures may be recovered from the client by the attorney,<sup>5</sup> or his representatives,<sup>6</sup> on due proof thereof.<sup>7</sup> There can be no such recovery, however, of unauthorized expenditures,<sup>8</sup> or those made necessary by the attorney's fault.<sup>9</sup> The disbursements of an attorney, in relation

<sup>4</sup> See *supra*, § 252. And as to liability for costs and expenses generally, see *supra*, §§ 305-311.

<sup>5</sup> *Kansas*.—Hazeltime v. Mahon, 8 Kan. App. 857 mem., 55 Pac. 467.

*Michigan*.—Crowell v. Truax, 94 Mich. 585, 54 N. W. 384.

*Missouri*.—Shuck v. Pfenninghausen, 101 Mo. App. 697, 74 S. W. 381; Young v. Lanznar, 133 Mo. App. 130, 112 S. W. 17.

*Nebraska*.—Sibley v. Rice, 58 Neb. 785, 79 N. W. 711.

*New York*.—Hanover v. Reynolds, 4 Dem. 385; Gibbs v. Prindle, 11 App. Div. 470, 42 N. Y. S. 329; Spence v. Bode, 57 Misc. 611, 108 N. Y. S. 593. See also Townsend v. Meyers, 142 App. Div. 851, 127 N. Y. S. 451, *modifying* 123 N. Y. S. 1075.

<sup>6</sup> *Badger* v. Celler, 41 App. Div. 599, 58 N. Y. S. 653.

<sup>7</sup> *Kult* v. Nelson, 25 Misc. 238, 55 N. Y. S. 56, *modifying* 24 Misc. 20, 53 N. Y. S. 95.

<sup>8</sup> *Illinois*.—Hughes v. Zeigler, 69 Ill. 38.

*Iowa*.—Forbes v. Chicago, etc., R. Co., 150 Ia. 177, Ann. Cas. 1912D 311, 129 N. W. 810.

*Michigan*.—Gray v. Emmons, 7 Mich. 533.

*New York*.—People v. Lockwood, 9 Daly 68; Townsend v. Meyers, 142 App. Div. 851, 127 N. Y. S. 451, *modifying* 123 N. Y. S. 1075.

Where attorneys contracted to accept a specified share of the recovery as their fee, which was to include services in the supreme court, they were not entitled to railway fares and hotel bills incurred in attending the appellate courts, since the contract contemplated that the stipulated fee should cover all services necessarily incidental to the proper conduct of the case and the attendance of the attorneys to that end. *Sanders v. Riddick*, (Tenn.) 156 S. W. 464.

<sup>9</sup> An attorney cannot recover from his client a sum paid by the attorney as costs imposed as a condition to amend the complaint so negligently drawn by the attorney that it did not state a cause of action. *Senftner v.*



to the demands and actions belonging to two jointly, may be collected of the two, though his employment, on the request to make such disbursements, was but by one.<sup>10</sup>

By statute in New York, counsel assigned to the defense of a capital case may be reimbursed for personal and incidental expenses.<sup>11</sup>

Kleinhans, 80 Misc. 519, 141 N. Y. S. 533.

<sup>10</sup> Davis *v.* Downer, 10 Vt. 529.

<sup>11</sup> Code Crim. Pro., § 308. Expenses of insanity specialists who testified at trial, and expenses of con-

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ferences with them before trial for a copy of the testimony at the coroner's inquest and for the attendance of witnesses before trial, are not allowable. People *v.* Prendergast, 157 App. Div. 486, 142 N. Y. S. 611.

## CHAPTER XXII.

### ACTIONS TO RECOVER COMPENSATION.

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*Right of Action.*

§ 487. **Generally.** — Contrary to the English practice,<sup>1</sup> attorneys may sue for their compensation in all jurisdictions in the

<sup>1</sup> See *supra*, § 401. See also *Thornhill v. Evans*, 2 Atk. (Eng.) 330; *Kennedy v. Brown*, 13 C. B. N. S. 677,

106 E. C. L. 677, wherein the earlier cases are reviewed.

United States,<sup>2</sup> either on express<sup>3</sup> or implied<sup>4</sup> contracts of employment. A similar rule prevails in some of the Canadian provinces.<sup>5</sup> In New Jersey, however, counsel fees can only be recovered under an express agreement to pay them; although there

<sup>2</sup> *United States*.—In *re* Paschal, 10 Wall. 483, 19 U. S. (L. ed.) 992; *Law v. Ewell*, 2 Cranch 144, 15 Fed. Cas. No. 8,127; *Mowat v. Brown*, 19 Fed. 87.

*Alabama*.—*Coopwood v. Wallace*, 12 Ala. 790.

*Arkansas*.—*Wilcox v. Boothe*, 19 Ark. 684; *Pulliam v. Booth*, 21 Ark. 421; *Fenno v. English*, 22 Ark. 170; *Weil v. Fineran*, 78 Ark. 87, 93 S. W. 568; *Lane, etc., Co. v. Taylor*, 80 Ark. 469, 97 S. W. 441, 7 L.R.A.(N.S.) 924.

*California*.—*Cahill v. Baird*, 138 Cal. 691, 72 Pac. 342, *reversing* 70 Pac. 1061.

*Colorado*.—*Hazeltine v. Brockway*, 26 Colo. 291, 57 Pac. 1077.

*Connecticut*.—*Pierce v. Norton*, 82 Conn. 441, 74 Atl. 686.

*Delaware*.—*Rogers v. Randal*, 2 Harr. 499; *Bayard v. McLane*, 3 Harr. 139.

*Georgia*.—*Watson v. Columbia Min. Co.*, 118 Ga. 603, 45 S. E. 460.

*Illinois*.—*Story v. Hull*, 143 Ill. 506, 32 N. E. 265; *Union, etc., Co. v. Tenney*, 102 Ill. App. 95, *affirmed* 200 Ill. 349, 65 N. E. 688; *Scott v. Morris*, 131 Ill. App. 605.

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*Louisiana*.—*Livingston v. Cornell*, 2 Mart. O. S. 281.

*Maryland*.—*Calvert v. Coxe*, 1 Gill 95.

*Missouri*.—*Shuck v. Pfenninghausen*, 101 Mo. App. 697, 74 S. W. 381.

*Nebraska*.—*Marshall v. Piggott*, 78 Neb. 722, 111 N. W. 592.

*New Jersey*.—*Schomp v. Schenck*, 40 N. J. L. 195, 29 Am. Rep. 219.

*New York*.—*Stevens v. Adams*, 23 Wend. 57; *Sheil v. Muir*, 51 Hun 644 mem., 4 N. Y. S. 272; *Flannery v. Geiger*, 46 Misc. 619, 92 N. Y. S. 785; *Spencer v. Busch*, 50 Misc. 284, 98 N. Y. S. 690; *Yuelis v. Hyman*, 84 N. Y. S. 460.

*Pennsylvania*.—*Foster v. Jack*, 4 Watts 334, *overruling* *Mooney v. Lloyd*, 5 S. & R. 412; *Seybert v. Salem Twp.*, 22 Pa. Super. Ct. 459.

*Tennessee*.—*Newman v. Washington, Mart. & Y.* 79.

*Texas*.—*Campbell v. Dennis*, 2 Tex. Unrep. Cas. 459.

*Utah*.—*Croco v. Oregon Short Line R. Co.*, 18 Utah 321, 54 Pac. 985; *Potter v. Ajax Min. Co.*, 22 Utah 273, 61 Pac. 999.

<sup>3</sup> See *supra*, §§ 404, 417; 439-446.

<sup>4</sup> See *supra*, §§ 404, 447-449.

<sup>5</sup> See *supra*, § 403. See also *Reg. v. Doutre*, 9 App. Cas. (Eng.) 745; *Paradis v. Bosse*, 21 Can. Sup. Ct. 419 (both of which cases were decided under the laws of the province of Quebec); *Armour v. Kilmer*, 28 Ont. 618; *McDougall v. Campbell*, 41 U. C. Q. B. 332 (decided under the laws of Ontario). And see *Mowat v. Brown*, 19 Fed. 87.

may be a recovery of compensation for services rendered otherwise than in the capacity of counsel on an implied promise.<sup>6</sup>

The right to sue for compensation is not affected by the fact that the attorney has, or is entitled to, a lien therefor.<sup>7</sup>

**§ 488. When Right of Action Accrues.**—The right of an attorney to sue for compensation for his services accrues at the termination of the suit or other legal business in which he was employed,<sup>8</sup> or when, without fault on his part, the contract of employment has been otherwise ended.<sup>9</sup> Thus, an attorney who is employed to collect certain judgments cannot exact his fees until the judgments are collected, or their collection is shown to be impossible.<sup>10</sup> The fact that suit was prematurely brought, however, does not bar a subsequent action.<sup>11</sup> But because an attorney who is retained generally to conduct legal proceedings enters into a contract to conduct them to their termination, it does not follow that he is not entitled to compensation from time to time for the services rendered, in the absence of an agreement to the contrary;<sup>12</sup> and a recovery may certainly be had under a contract whereby the attorney was to be paid all, or some part, of his compensation

<sup>6</sup> See *supra*, § 405. See also Schomp v. Schenck, 40 N. J. L. 195, 29 Am. Rep. 219; Hopper v. Ludlum, 41 N. J. L. 182; McCrea v. Stierman, 76 N. J. L. 394, 69 Atl. 1008.

<sup>7</sup> Scott v. Morris, 131 Ill. App. 605; Flannery v. Geiger, 46 Misc. 619, 92 N. Y. S. 785.

<sup>8</sup> *Arkansas*.—Fenno v. English, 22 Ark. 170.

*Georgia*.—Fry v. Lofton, 45 Ga. 171.

*Louisiana*.—State v. Atchafalaya R., etc., Co., 5 Rob. 66.

*Massachusetts*.—Hubbard v. Woodbury, 7 Allen 422.

*Mississippi*.—Holly Springs v. Manning, 55 Miss. 380.

*New York*.—Porter v. Ruckman, 38 N. Y. 210; Bathgate v. Haskin, 59 N. Y. 533, reversing 5 Daly 361; Sessions v. Palmeto, 75 Hun 268, 26 N.

Y. S. 1076; Adams v. Ft. Plain Bank, 23 How. Pr. 45.

*Pennsylvania*.—Mattern v. McDivett, 113 Pa. St. 402, 6 Atl. 83.

<sup>9</sup> Hazeltine v. Brockway, 26 Colo. 291, 57 Pac. 1077; Watson v. Columbia Min. Co., 118 Ga. 603, 45 S. E. 460; Henry v. Vance, 111 Ky. 72, 63 S. W. 273; Copp v. Colorado Coal, etc., Co., 33 Misc. 773, 67 N. Y. S. 970, affirming 32 Misc. 241, 65 N. Y. S. 789; Yucells v. Hyman, 84 N. Y. S. 460. See also *supra*, §§ 450–460; and see *infra*, § 523.

<sup>10</sup> Succession of Zenon, 34 La. Ann. 1187.

<sup>11</sup> Porter v. Ruckman, 38 N. Y. 210.

<sup>12</sup> Sessions v. Palmeto, 75 Hun 268, 26 N. Y. S. 1076. See also Tenney v. Berger, 93 N. Y. 524, 45 Am. Rep. 263.

prior to the conclusion of the business undertaken.<sup>13</sup> So, an attorney who was employed, in anticipation of litigation, to defend any and all suits that might be brought against his client, and who appeared in and defended some of such suits, may institute proceedings for the recovery of his compensation at the termination of each action wherein he appeared.<sup>14</sup> A demand upon the client for payment, prior to bringing suit, is not necessary.<sup>15</sup> Under a New Jersey statute an attorney cannot commence or maintain suit against a client for any fees, charges, or disbursements, until he shall have delivered to such client a copy of a taxed bill thereof.<sup>16</sup>

**§ 489. As Affected by Nature of Services.** — An attorney may, of course, recover compensation for all professional services. Sometimes, however, attorneys are so employed that it is difficult to determine wherein they are, or are not, acting professionally.<sup>17</sup> It has been held that an attorney may bring suit for the recovery of a retaining fee,<sup>18</sup> or for compensation rendered in the procurement of a settlement of pending litigation,<sup>19</sup> or for watching the progress of litigation,<sup>20</sup> or for prosecuting claims against

<sup>13</sup> *Wells v. Gilpin*, 19 Colo. 305, 35 Pac. 545.

<sup>14</sup> *Osborn v. Hopkins*, 160 Cal. 501, Ann. Cas. 1913A 413, 117 Pac. 519.

<sup>15</sup> *Gibbs v. Davis*, 11 Ore. 288, 3 Pac. 677. See also *Ohio, etc., R. Co. v. Smith*, 5 Ind. App. 36, 31 N. E. 371; *Bruyn v. Comstock*, 56 Barb. (N. Y.) 9; *Foster v. Newbrough*, 66 Barb. (N. Y.) 645; *Gleason v. Clark*, 9 Cow. (N. Y.) 57; *Davis v. Farwell*, 80 Vt. 166, 67 Atl. 129.

<sup>16</sup> *Strong v. Mundy*, 52 N. J. Eq. 833, 31 Atl. 611; *Truitt v. Darnell*, 65 N. J. Eq. 221, 55 Atl. 692; *McCrea v. Stierman*, 76 N. J. L. 394, 69 Atl. 1008.

In *Strong v. Mundy*, 52 N. J. Eq. 834, 31 Atl. 611, it was held that an attorney might, without taxation of

items, retain the amount of his reasonable fees, charges, and disbursements from moneys collected by him for his client in the same suit. And see *supra*, § 476.

<sup>17</sup> *Kelley v. Richardson*, 69 Mich. 430, 37 N. W. 514.

<sup>18</sup> *Stevens v. Monges*, 1 Har. (Del.) 127; *Union Surety & Guaranty Co. v. Tenney*, 102 Ill. App. 95, *affirmed* 200 Ill. 349, 65 N. E. 688; *Brackenridge v. McFarlane, Add. (Pa.)* 49; *Gray v. Brackenridge*, 2 P. & W. (Pa.) 75, *overruling* *Mooney v. Lloyd*, 5 S. & R. (Pa.) 412; *Foster v. Jack*, 4 Watts (Pa.) 334. See also, § 406.

<sup>19</sup> *Stoutenburgh v. Fleer*, 87 N. Y. S. 504.

<sup>20</sup> *Warren v. Sheehan*, 156 Mich. 432, 120 N. W. 810.

the government,<sup>1</sup> or procuring a pardon for one convicted of crime.<sup>2</sup> So, it has been held that compensation may be recovered for services rendered by attorneys in leasing certain lands,<sup>3</sup> or for procuring grants of municipal franchises.<sup>4</sup>

A suit cannot be maintained, however, on contracts of employment which are void for illegality,<sup>5</sup> although where services have been performed under such a contract there may, in some instances, be a recovery of the value thereof on a *quantum meruit*.<sup>6</sup>

### *Form of Action—Parties.*

§ 490. **Action at Law.** — While an attorney at law may retain his fees out of money secured through his services, which comes into his possession,<sup>7</sup> in other cases some legal proceeding is necessary.<sup>8</sup> The usual remedy for the recovery of compensation is by an action at law,<sup>9</sup> either in assumpsit, or its equivalent under modern practice acts.<sup>10</sup> This is also true as to the recovery

<sup>1</sup> *Wright v. Tebbitts*, 91 U. S. 252, 23 U. S. (L. ed.) 320; *Stanton v. Embrey*, 93 U. S. 548, 23 U. S. (L. ed.) 983; *Taylor v. Bemiss*, 110 U. S. 42, 3 S. Ct. 441, 28 U. S. (L. ed.) 64. See also *supra*, § 434.

<sup>2</sup> *Moyer v. Cantieny*, 41 Minn. 242, 42 N. W. 1060; *Stroemer v. Van Orsdel*, 74 Neb. 132, 103 N. W. 1053, 121 Am. St. Rep. 713, 4 L.R.A.(N.S.) 212, *affirmed* on rehearing 74 Neb. 143, 107 N. W. 125, 121 Am. St. Rep. 722, 4 L.R.A.(N.S.) 218.

<sup>3</sup> *Bogan v. Wright*, 22 Misc. 94, 48 N. Y. S. 546.

<sup>4</sup> *Breen v. Union R. Co.*, 9 App. Div. 122, 75 N. Y. St. Rep. 615, 41 N. Y. S. 164.

<sup>5</sup> See *supra*, §§ 433-437.

<sup>6</sup> See *supra*, § 438.

<sup>7</sup> As to retaining compensation from funds in hand, see *supra*, § 476.

<sup>8</sup> In *re Strike*, 1 Bland (Md.) 57; *Seybert v. Salem Tp.*, 22 Pa. Super. Ct. 459.

<sup>9</sup> *United States*.—*Law v. Ewell*, 2 Cranch C. C. 144, 15 Fed. Cas. No. 8,127.

*Mississippi*.—*Pugh v. Dorsey*, 8 Smedes & M. 379.

*Missouri*.—*Harrison v. Murphy*, 106 Mo. App. 465, 80 S. W. 724; *Smith v. Wright*, 153 Mo. App. 719, 134 S. W. 683.

*New York*.—*Lynch v. Willard*, 6 Johns. Ch. 342; *Lorillard v. Robinson*, 2 Paige 276; *Wilde v. Joel*, 6 Duer 671, 15 How. Pr. 320; *Holmes v. Bell*, 139 App. Div. 455, 124 N. Y. S. 301, *affirmed* 200 N. Y. 586, 94 N. E. 1094.

<sup>10</sup> *United States*.—*Law v. Ewell*, 2 Cranch C. C. 144, 15 Fed. Cas. No. 8,127.

*Alabama*.—*Humes v. Decatur Land Improvement & Furnace Co.*, 98 Ala. 461, 13 So. 368; *White v. Tolliver*, 110 Ala. 300, 20 So. 97.

*Arkansas*.—*Wilcox v. Boothe*, 19 Ark. 684.

*Delaware*.—*Stevens v. Monges*, 1



of compensation earned as associate counsel, whether the action is brought against the client or his attorney of record.<sup>11</sup>

**§ 491. Suit in Equity.**— Ordinarily an attorney, having an adequate remedy at law, cannot proceed in a court of equity for the recovery of compensation due him by a client.<sup>12</sup> Thus where two attorneys, not partners, were employed to prosecute several suits, it was held that a bill for an accounting would not lie at the suit of one of them against the other, even though he had misrepresented the amount of fees received from the client, and fraudulently retained more than his share thereof.<sup>13</sup>

Equitable relief may be had by attorneys, however, where such relief would be available under similar circumstances to other litigants. Thus it has been held that an attorney may proceed in equity against one who becomes possessed of a fund out of

Har. 127; *Rogers v. Randel*, 2 Har. 499.

*District of Columbia.*—*Gilbert v. Fay*, 4 App. Cas. 38.

*Illinois.*—*Gorrell v. Payson*, 170 Ill. 213, 48 N. E. 433; *People's Casualty Claim Adjustment Co. v. Darrow*, 172 Ill. 62, 49 N. E. 1005, *affirming* 70 Ill. App. 22; *Funk v. Mohr*, 185 Ill. 395, 57 N. E. 2; *Meyer v. McCumber*, 75 Ill. App. 119; *Sexton v. Bradley*, 110 Ill. App. 495.

*Indiana.*—*Union Mut. Life Ins. Co. v. Buchanan*, 100 Ind. 63.

*Maine.*—*Matthews v. Williams Mfg. Co.*, 98 Me. 234, 56 Atl. 759.

*Maryland.*—*Calvert v. Coxe*, 1 Gill 95.

*Massachusetts.*—*Aldrich v. Brown*, 103 Mass. 527.

*Michigan.*—*Eggleston v. Boardman*, 37 Mich. 14; *Lungerhausen v. Crittenden*, 103 Mich. 173, 61 N. W. 270; *Dawson v. Peterson*, 110 Mich. 431, 68 N. W. 246; *Smedley v. Grand Haven*, 125 Mich. 424, 84 N. W. 626.

*New York.*—*Stockholm v. Robbins*,

24 Wend. 109; *Flannery v. Geiger*, 46 Misc. 619, 92 N. Y. S. 785.

*Oklahoma.*—*Mellon v. Fulton*, 22 Okla. 636, 98 Pac. 911, 19 L.R.A. (N.S.) 960.

*Pennsylvania.*—*Foster v. Jack*, 4 Watts 334; *Thompson v. Boyle*, 85 Pa. St. 477; *Thompson v. Minor*, 35 Leg. Int. 244.

*Vermont.*—*Bell v. McEran*, 3 Vt. 185.

*Virginia.*—*Major's Ex'r v. Gibson*, 1 Pat. & H. 48.

<sup>11</sup> *Harrison v. Murphy*, 106 Mo. App. 465, 80 S. W. 724; *Brown v. New York*, 9 Hun (N. Y.) 587; *Willis v. Carford*, 38 Ore. 522, 63 Pac. 985, 64 Pac. 866, 53 L.R.A. 904. See also *supra*, §§ 210; 407-409.

<sup>12</sup> *In re Gillaspie*, 190 Fed. 88; *Smith v. Wright*, 153 Mo. App. 719, 134 S. W. 683; *Miller v. Newell*, 20 S. C. 123, 47 Am. Rep. 833. And see the preceding section.

<sup>13</sup> *Willis v. Carford*, 38 Ore. 522, 63 Pac. 985, 64 Pac. 866, 53 L.R.A. 904.

which his compensation is to come.<sup>14</sup> So, a suit in equity may be maintained by an attorney to enforce an equitable assignment of an interest in the subject-matter of the litigation which was made to him as compensation for his services.<sup>15</sup> In Tennessee the courts of chancery have authority, either at the instance of the suitor, or, in some cases, at the instance of counsel, to ascertain the reasonable compensation of counsel for professional services in pending cases.<sup>16</sup> Accountings between law partners,<sup>17</sup> and between attorney and client, have been considered heretofore.<sup>18</sup>

§ 492. **Summary Proceedings.** — It is well settled that an attorney's claim against his client for compensation cannot be determined summarily.<sup>19</sup> Nor will summary proceedings lie for the recovery of compensation as between several counsel;<sup>20</sup> thus where the original attorney of record was discharged, and the suit was prosecuted to judgment by another, the attorney who was discharged cannot, by a rule to show cause on the plaintiff, secure payment of his fees out of the moneys in the hands of the attor-

<sup>14</sup> *Harrison v. Murphy*, 106 Mo. App. 465, 80 S. W. 724. Compare *Willis v. Carford*, 38 Ore. 522, 63 Pac. 985, 64 Pac. 866, 53 L.R.A. 904.

<sup>15</sup> *Deering v. Schreyer*, 171 N. Y. 451, 64 N. E. 179, *modifying* 58 App. Div. 322, 68 N. Y. S. 1015; *Bennett v. Donovan*, 83 App. Div. 95, 82 N. Y. S. 506. See also *supra*, §§ 425, 426.

<sup>16</sup> *Yourie v. Nelson*, 1 Tenn. Ch. 614.

<sup>17</sup> See *supra*, § 475.

<sup>18</sup> See *supra*, § 344.

<sup>19</sup> *Georgia*.—*Keefer v. Keefer*, 78 S. E. 462.

*Kentucky*.—*Foot v. Culbertson*, 8 Ky. L. Rep. 62 (abstract). Compare *Gordon v. Gordon*, 6 Ky. L. Rep. 439 (abstract).

*Louisiana*.—See *Nolan v. Taylor*, 12 La. Ann. 201.

*Maryland*. In re *Strike*, 1 Bland 57.

*Nebraska*.—*Williams v. Miles*, 63 Neb. 851, 89 N. W. 455.

*New York*.—*Dimick v. Cooley*, 3 Civ. Proc. 141; In re *Halsey*, 13 Abb. N. C. 353; *Hoes v. Halsey*, 2 Dem. 577; *Schriever v. Brooklyn Heights R. Co.*, 49 App. Div. 629, 63 N. Y. S. 217, *modifying* 30 Misc. 145, 30 Civ. Proc. 67, 61 N. Y. S. 644, 890. See also *Goddard v. Stiles*, 90 N. Y. 199.

*Tennessee*.—Ex parte *Smithson*, 108 Tenn. 442, 67 S. W. 864.

*Washington*.—*McRea v. Warehime*, 49 Wash. 194, 94 Pac. 924.

<sup>20</sup> *Baldwin v. Foss*, 16 Neb. 80, 19 N. W. 496, 16 Neb. 298, 20 N. W. 348; *Taylor v. Long Island R. Co.*, 38 App. Div. 595, 6 N. Y. Ann. Cas. 341, 56 N. Y. S. 665; *Dailey v. Wellbrock*, 65 App. Div. 523, 72 N. Y. S. 848.

ney who tried the case.<sup>1</sup> Summary proceedings as between attorney and client have been considered heretofore.<sup>2</sup>

§ 493. **Parties.** — Several attorneys who jointly represent the same client may sue as joint plaintiffs for their compensation.<sup>3</sup> So, several attorneys may be joined as defendants in an action brought by associate counsel, retained by them, for his compensation.<sup>4</sup> Where, however, several counsel are retained under separate and distinct contracts of employment, they should bring suit individually.

Services rendered by a law firm must be sued for in the firm name.<sup>5</sup> The firm may also maintain an action to recover for the services of any of its members.<sup>6</sup> But an attorney may sue in his own name for services rendered by him in his individual capacity, even though, in fact, he is a member of a law firm,<sup>7</sup> and his partner has assisted him in the performance of the services for which suit is brought.<sup>8</sup> And where, after the dissolution of a law partnership, a suit is brought by one of the former partners, in his own name, for services rendered by him in connection with a matter wherein his firm had been retained, it may be inferred that it was agreed among the partners, on their dissolution, that the plaintiff should attend to the business and receive the compensation for which the suit was brought.<sup>9</sup>

As a rule, only the client need be made a party defendant.<sup>10</sup>

<sup>1</sup> *Seybert v. Salem Twp.*, 22 Pa. Super. Ct. 459.

<sup>2</sup> See *supra*, §§ 354-364.

<sup>3</sup> *Starrett v. Gault*, 62 Ill. App. 209.

<sup>4</sup> *Harrison v. Murphy*, 106 Mo. App. 465, 80 S. W. 724.

<sup>5</sup> *Shirts v. Rooker*, 21 Ind. App. 420, 52 N. E. 629; *Dennis v. First Nat. Bank*, 33 Wash. 161, 73 Pac. 1125.

<sup>6</sup> *French v. Cunningham*, 149 Ind. 632, 49 N. E. 797; *Warner v. Griswold*, 8 Wend. (N. Y.) 665; *Maynard v. Briggs*, 26 Vt. 94; *Dennis v. First Nat. Bank*, 23 Wash. 161, 73 Pac. 1125; *Thorp v. Ramsey*, 51 Wash. 530, 99 Pac. 584.

<sup>7</sup> *Webb v. Trescony*, 76 Cal. 621, 18 Pac. 796; *Moshier v. Frost*, 110 Ill. 206; *James T. Hair Co. v. Thorne*, 27 Ill. App. 502; *Platt v. Halen*, 23 Wend. (N. Y.) 456; *McCabe v. Goodfellow*, 21 Civ. Proc. 66, 15 N. Y. S. 377.

<sup>8</sup> *Ostrander v. Capitol Investment Bldg. & Loan Assoc.*, 130 Mich. 312, 89 N. W. 964.

<sup>9</sup> *Anderson v. Tarpley*, 6 Smedes & M. (Miss.) 507.

<sup>10</sup> *Filmore v. Wells*, 10 Colo. 228, 15 Pac. 343, 3 Am. St. Rep. 567; *Adams v. Fox*, 40 Barb. (N. Y.) 442.

Where, however, a third person becomes liable for the attorney's compensation, then he, and not the client, may be sued,<sup>11</sup> though in some instances the client and such third person may be joined as defendants.<sup>12</sup>

### *Pleading.*

§ 494. **Declaring on Express Contract.** — Where an attorney's claim for compensation is based on an open and subsisting valid contract, it must be declared upon in an action brought by him for the recovery of the amount due thereunder.<sup>13</sup> In such cases the contract cannot be abandoned, and a recovery sought on a *quantum meruit*.<sup>14</sup> As a general rule, it will be sufficient to incorporate the contract in the declaration or complaint, show the performance of services thereunder, and allege the indebtedness, and the failure of the defendant to pay the same.<sup>15</sup>

But where the contract relates to a specific matter, a recovery cannot be had thereunder for other services which were not within the scope of the contract.<sup>16</sup> So where, notwithstanding the existence of a contract for compensation, the relation of attorney and client has been prematurely severed, a declaration upon the contract as if it had been constructively performed is not good; and this is also true where the duties undertaken by the attorney have been partially performed and, in consequence thereof, the attorney is entitled to recover upon a *quantum meruit*.<sup>17</sup>

<sup>11</sup> *Christie v. Sawyer*, 44 N. H. 298.

<sup>12</sup> *Adams v. Fox*, 40 N. Y. 577. See also *supra*, § 460.

<sup>13</sup> *Arkansas*.—*Weil v. Fineran*, 78 Ark. 87, 93 S. W. 568.

*Georgia*.—*Bull v. St. Johns*, 39 Ga. 78.

*Illinois*.—*Wilson v. Hart*, 129 Ill. App. 329.

*Michigan*.—*Cavanaugh v. Robinson*, 138 Mich. 554, 101 N. W. 824.

*New York*.—*McDonald v. De Vito*, 118 App. Div. 566, 103 N. Y. S. 508.

<sup>14</sup> *Johnson v. Clarke*, 22 Ga. 541; *White v. Wright*, 16 Mo. App. 551.

<sup>15</sup> *Bartlett v. Odd-Fellows' Sav. Bank*, 79 Cal. 218, 21 Pac. 743, 12 Am. St. Rep. 139. See also *Smiley v. Meir*, 47 Ind. 559 (suit on a note given for counsel fees).

<sup>16</sup> *Wells v. Haynes*, 101 Ga. 841, 28 S. E. 968.

<sup>17</sup> *Henry v. Vance*, 111 Ky. 72, 63 S. W. 273.

As to the right of an attorney to recover where the contract of employment has been prematurely terminated, see *supra*, §§ 450-460.

§ 495. **Declaring on Quantum Meruit.**—Where the amount of compensation claimed is not fixed by an agreement between the parties, or where, even though there has been such an agreement, it was so terminated by the client as to entitle the attorney to reasonable compensation for the services performed thereunder, the attorney must declare on a *quantum meruit*, and it is essential that he should allege all the facts necessary to warrant a recovery.<sup>18</sup> A statement of the pleader's conclusions is not enough.<sup>19</sup>

As a general rule, it will be sufficient to allege the employment, the performance of the services undertaken or some sufficient excuse for nonperformance, the value of the services rendered, and the defendant's indebtedness. In some jurisdictions the common counts in assumpsit are sufficient for this purpose.<sup>20</sup> But where fraud is charged on the part of the client, the pleader should be particularly careful in his narration of the facts.<sup>1</sup> And where the services sued for were rendered under a contract which was prematurely terminated by the client without cause, it is advisable, and necessary in some jurisdictions, to aver that the plaintiff had elected to treat the contract as rescinded.<sup>2</sup> So, it has been held that where recovery is sought for professional serv-

<sup>18</sup> *Prince v. Kennedy*, 3 Cal. App. 404, 85 Pac. 859; *Cleveland, C. C. & St. L. R. Co. v. Shrum*, 24 Ind. App. 96, 55 N. E. 515; *Ferris v. Lawrence*, 138 App. Div. 541, 123 N. Y. S. 209; *Williams v. Dodge*, 8 Misc. 317, 28 N. Y. S. 729.

<sup>19</sup> *Cleveland, C., C. & St. L. R. Co. v. Shrum*, 24 Ind. App. 96, 55 N. E. 515.

<sup>20</sup> *Arkansas*.—*Roysdon v. Sumner*, 2 Ark. 465.

*Illinois*.—*People's Casualty Claim Adjustment Co. v. Darrow*, 70 Ill. App. 22, affirmed 172 Ill. 62, 49 N. E. 1005.

*Indiana*.—*Hornaday v. Campbell*, 21 Ind. 76.

*Michigan*.—*Eggleston v. Boardman*, 37 Mich. 14.

*Missouri*.—*Warder v. Seitz*, 157

Mo. 140, 57 S. W. 537; *Gabbert v. Penfield*, 125 Mo. App. 436, 102 S. W. 627.

*Montana*.—*Sanford v. Newell*, 18 Mont. 126, 44 Pac. 522.

*New York*.—*Wilson v. Burr*, 25 Wend. 386.

*Oregon*.—*Gibbs v. Davis*, 11 Ore. 288, 3 Pac. 677.

<sup>1</sup> *Hanna v. Island Coal Co.*, 5 Ind. App. 163, 31 N. E. 846, 51 Am. St. Rep. 246.

In the following cases it was held that the statements of facts charging fraud were sufficient. *Randall v. Van Wagenen*, 115 N. Y. 527, 22 N. E. 361, 17 Civ. Proc. 403, 12 Am. St. Rep. 828; *Fowler v. Morrill*, 8 Tex. 153.

<sup>2</sup> *Weil v. Fineran*, 78 Ark. 87, 93 S. W. 568.

ices rendered in another state, the plaintiff must allege that such an action was maintainable under the laws of that state.<sup>3</sup>

Surplusage may be stricken out.<sup>4</sup>

**§ 496. Alleging Performance.**—The declaration or complaint must allege that the services undertaken by the attorney were performed,<sup>5</sup> but it is not necessary that the services should be itemized and a distinct value placed upon each item thereof;<sup>6</sup> it will be sufficient to state the facts constituting the cause of action in ordinary and concise language, and if the defendant desires further information he may call for a bill of particulars, the allowance of which is usually discretionary with the court.<sup>7</sup> Of course, if a contract of employment obliges the attorney to make a detailed and separate charge for each item of service rendered, then he should, in an action against his client to recover the fee,

<sup>3</sup> *Williams v. Dodge*, 8 Misc. 317, 28 N. Y. S. 729.

<sup>4</sup> *Dickinson v. Devlin*, 46 Super. Ct. (N. Y.) 232; *Aycock v. Baker*, (Tex.) 60 S. W. 273.

<sup>5</sup> *Fague v. Corcoran*, 3 Mackey (D. C.) 199.

<sup>6</sup> *California*—*Aydelotte v. Bloom*, 13 Cal. App. 56, 108 Pac. 877.

*Kentucky*.—*Morehead's Trustee v. Anderson*, 125 Ky. 77, 100 S. W. 340.

*Massachusetts*.—*Pierce v. Parker*, 121 Mass. 403; *Powers v. Manning*, 154 Mass. 370, 28 N. E. 290, 13 L.R.A. 258.

*Ohio*.—*Holmes v. Holland*, 11 Ohio Dec. (Reprint) 768, 29 Am. L. Rec. 115; *Derringer v. Pugh*, 3 Ohio Cir. Dec. 706, 7 Ohio Cir. Ct. 158.

*Texas*.—*Carothers v. Walton*, 1 S. W. 79.

*Washington*.—*Thorp v. Ramsey*, 51 Wash. 530, 99 Pac. 584.

*West Virginia*.—*Watts v. West Virginia Southern R. Co.*, 48 W. Va. 262, 37 S. E. 709.

A claim for a retaining fee need not be specifically alleged; it will be considered as included in a general allegation of the amount due for professional services, and may be so proved. *Knight v. Russ*, 77 Cal. 410, 19 Pac. 698; *Roche v. Baldwin*, 143 Cal. 186, 76 Pac. 956; *Aydelotte v. Bloom*, 13 Cal. App. 56, 108 Pac. 877.

<sup>7</sup> *California*.—*Knight v. Russ*, 77 Cal. 410, 19 Pac. 698; *Aydelotte v. Bloom*, 13 Cal. App. 56, 108 Pac. 877.

*Missouri*.—*Taussig v. St. Louis & K. R. Co.*, 186 Mo. 269, 85 S. W. 378.

*New York*.—*Betts v. Betts*, 4 Abb. N. Cas. 317; *Aub v. Hoffmann*, 120 App. Div. 50, 104 N. Y. S. 913; *Squires v. Kissam*, 121 App. Div. 607, 106 N. Y. S. 373; *Phillips v. Stanton*, 9 N. Y. St. Rep. 503.

*Pennsylvania*.—*Cummings v. Thomas*, 1 W. N. C. 311; *Williams v. Huidekoper*, 1 W. N. C. 376; *Newlin v. Armstrong*, 8 W. N. C. 255.

file a bill of particulars in the first instance, setting out fully and in detail the services charged for.<sup>8</sup>

**§ 497. Alleging Indebtedness.** — Ordinarily the declaration should allege the amount of the defendant's indebtedness, the time it became due, and the failure of the defendant to pay it,<sup>9</sup> though in some jurisdictions some of these formalities may be dispensed with under local practice acts,<sup>10</sup> particularly where, from the statement of facts alleged in the declaration, the law will itself imply a promise on the part of the defendant to pay the amount charged.<sup>11</sup>

**§ 498. Alleging Plaintiff's Qualification to Practice Law.** — The declaration should allege that the plaintiff was a qualified attorney at law at the time of the rendition of the services for which he seeks to recover.<sup>12</sup> No particular formality is required in this respect: it will be sufficient to allege that the plaintiff was "engaged in the practice of law."<sup>13</sup> The failure of the plaintiff to allege his qualification, however, cannot be taken advantage of on a motion in arrest of judgment,<sup>14</sup> and it will be cured by a finding that the services were performed by the plaintiff as attorney for the defendant;<sup>15</sup> and it has been intimated that it is not necessary for the plaintiff to allege his qualification.<sup>16</sup>

**§ 499. Defensive Pleading.** — The plaintiff's declaration or complaint having been filed and served, the defendant, unless he wishes to default, must file and serve such defensive pleading as

<sup>8</sup> *Morehead's Trustee v. Anderson*, 125 Ky. 77, 100 S. W. 340.

<sup>9</sup> *Baxter v. Billings*, 83 Fed. 790, 49 U. S. App. 767, 28 C. C. A. 85; *Prince v. Kennedy*, 3 Cal. App. 404, 85 Pac. 859; *Harlan v. Lambert*, 19 Cal. App. 349, 125 Pac. 1079; *Cleveland, C. C. & St. L. R. Co. v. Shrum*, 24 Ind. App. 96, 55 N. E. 515.

<sup>10</sup> *MacMahon v. Duffy*, 36 Ore. 150, 59 Pac. 184.

<sup>11</sup> *Cusick v. Boyne*, 1 Cal. App. 643,

82 Pac. 985; *Brady v. New York*, 1 Sandf. (N. Y.) 569; *Dickinson v. Devlin*, 46 Super. Ct. (N. Y.) 232.

<sup>12</sup> *Kersey v. Garton*, 77 Mo. 645.

<sup>13</sup> *Prince v. Kennedy*, 3 Cal. App. 404, 85 Pac. 859.

<sup>14</sup> *Kersey v. Garton*, 77 Mo. 645, 5 Ky. L. Rep. 2, 16 Cent. L. J. 472.

<sup>15</sup> *Miller v. Ballerino*, 135 Cal. 566, 67 Pac. 1046, 68 Pac. 600.

<sup>16</sup> *Miller v. Ballerino*, 135 Cal. 566, 67 Pac. 1046, 68 Pac. 600.

is required by the local practice. As a rule, the defendant replies by filing and serving an answer or affidavit of defense, and it is essential that such pleading, to be effective, should either deny the material allegations of the declaration or complaint,<sup>17</sup> or set up some sufficient affirmative defense.<sup>18</sup> Thus, the defendant may aver that he did not employ the plaintiff,<sup>19</sup> or that the contract of employment was void or voidable,<sup>20</sup> or that he was not indebted to the plaintiff in any amount,<sup>1</sup> or that the amount of his indebtedness was less than that claimed by the plaintiff,<sup>2</sup> or that he had paid the plaintiff in full,<sup>3</sup> or that the plaintiff had agreed to perform the services in question gratuitously.<sup>4</sup> So, the defendant may allege that the plaintiff failed to perform the services undertaken by him,<sup>5</sup> or that they were negligently performed.<sup>6</sup>

In setting up affirmative defenses, an averment of the pleader's conclusions will not do;<sup>7</sup> the facts upon which such defenses rest must be clearly stated.<sup>8</sup>

<sup>17</sup> *Colorado*.—Mulligan v. Smith, 32 Colo. 404, 76 Pac. 1063.

*District of Columbia*.—Whiting v. Davidge, 23 App. Cas. 156; Heiberger v. Worthington, 23 App. Cas. 565.

*Iowa*.—Musser v. Crum, 48 Ia. 52.

*New York*.—Pierce v. Newlin, 46 Misc. 122, 91 N. Y. S. 377.

*Oregon*.—Bowles v. Doble, 11 Ore. 474, 5 Pac. 918.

<sup>18</sup> *Dobbs v. Campbell*, 66 Kan. 805, 72 Pac. 273.

Defenses generally have been considered *infra*, §§ 551-564.

<sup>19</sup> *Sparks v. Forrest*, 85 Ark. 425, 108 S. W. 835. See also *infra*, § 507. And as to evidence of employment, see also *infra*, § 508.

<sup>20</sup> *Cary v. Western Union Tel. Co.*, 47 Hun 610, 15 N. Y. St. Rep. 204. See also *infra*, § 517.

As to matters affecting the validity of contracts of employment generally, see *supra*, §§ 428-438.

<sup>1</sup> *Schermerhorn v. Van Allen*, 18 Barb. (N. Y.) 29.

<sup>2</sup> *Blizzard v. Applegate*, 61 Ind. 368; *Templin v. Henkle*, 50 Ia. 95; *Schermerhorn v. Van Allen*, 18 Barb. (N. Y.) 29.

<sup>3</sup> *Lausing v. Ensign*, 62 How. Pr. (N. Y.) 363.

<sup>4</sup> *Newton v. More*, 14 Ark. 166. See also *infra*, § 559.

<sup>5</sup> *Cooper v. Stinson*, 5 Minn. 201.

As to evidence of performance generally, see *infra*, §§ 523-528.

<sup>6</sup> *Buttrick v. Gilman*, 22 Wis. 356. See also *infra*, § 553.

<sup>7</sup> *Mulligan v. Smith*, 32 Colo. 404, 76 Pac. 1063.

<sup>8</sup> *California*.—*Prince v. Kennedy*, 3 Cal. App. 498, 86 Pac. 609.

*District of Columbia*.—*Whiting v. Davidge*, 23 App. Cas. 156.

*Indiana*.—*Blizzard v. Applegate*, 61 Ind. 368.

*Kansas*.—*St. Louis, Ft. S. & W. R. Co. v. Grove*, 39 Kan. 731, 18 Pac. 958.

*Missouri*.—*Comstock v. Flower*, 109 Mo. App. 275, 84 S. W. 207.

*New York*.—*Lausing v. Ensign*, 62



*Allegations and Proof.*

§ 500. **Generally.**—The evidence must be material<sup>9</sup> to the issues raised by the pleadings.<sup>10</sup> Thus, an action based on an express contract cannot be established by proof of the reasonable value of the services rendered,<sup>11</sup> nor can an action on a *quantum meruit* be sustained by proof of an express contract.<sup>12</sup> Attention should be given to these matters in the preparation of the pleadings. Under modern methods of practice, however, the way of the transgressor is not as hard as it was at common law. A variance will be deemed to exist now only for some substantial cause.<sup>13</sup> Thus, in one case, a plaintiff who sued on an express

How Pr. 363; *Butler v. General Accident Assur. Corp.*, 103 App. Div. 273, 16 N. Y. Ann. Cas. 201, 92 N. Y. S. 1025; *Pierce v. Newlin*, 46 Misc. 122, 91 N. Y. S. 377; *Dickinson v. Devlin*, 46 Super. Ct. 232; *Ditmas v. Hitchings*, 29 N. Y. S. 776.

*Pennsylvania*.—*Chain v. Hart*, 140 Pa. St. 374, 21 Atl. 442.

*South Carolina*.—*Harper v. Williamson*, 1 McCord L. 156.

*Utah*.—*Potter v. Ajax Min. Co.*, 22 Utah 273, 61 Pac. 999.

*Washington*.—*Sessions v. Warwick*, 46 Wash. 165, 89 Pac. 482.

<sup>9</sup> *Georgia*.—*Swift v. Register*, 97 Ga. 446, 25 S. E. 315.

*Massachusetts*.—*Cooke v. Plaisted*, 181 Mass. 82, 62 N. E. 1054.

*Michigan*.—*Walbridge v. Barrett*, 118 Mich. 433, 76 N. W. 973.

*Missouri*.—*Dempsey v. Wells*, 109 Mo. App. 470, 84 S. W. 1015; *Thompson v. Emerson*, 118 Mo. App. 232, 94 S. W. 818; *Randolph v. St. Joseph. S. & N. R. Co.*, 118 Mo. App. 460, 94 S. W. 309.

*Tennessee*.—*Callender v. Turpin*, 61 S. W. 1057.

*Texas*.—*Higgins v. Matlock*, 95 S. W. 571.

Attys. at L. Vol. H.—56.

*Wisconsin*.—*Yates v. Shepardson*, 27 Wis. 238.

<sup>10</sup> *California*.—*Roche v. Baldwin*, 135 Cal. 522, 65 Pac. 459, 67 Pac. 903. *Louisiana*.—*Ealer v. McAllister*, 19 La. Ann. 21.

*Massachusetts*.—*Cooke v. Plaisted*, 181 Mass. 82, 62 N. E. 1054.

*Minnesota*.—*Cooper v. Stinson*, 5 Minn. 201.

*Missouri*.—*Thompson v. Emerson*, 118 Mo. App. 232, 94 S. W. 818.

*New York*.—*Barker v. Cairo & Fulton R. Co.*, 3 Thomp. & C. 328.

*Texas*.—*Higgins v. Matlock*, 95 S. W. 571.

<sup>11</sup> *Dudley v. Sanders Mfg. Co.*, 114 Fed. 981; *Ellis v. Woodburn*, 24 Pac. 893, *affirmed* 89 Cal. 129, 26 Pac. 963; *Boyd v. Boyce*, (Tex.) 53 S. W. 720. See also *supra*, §§ 439, 440.

<sup>12</sup> *Roche v. Baldwin*, 135 Cal. 522, 65 Pac. 459, 67 Pac. 903; *Gilbert v. Fay*, 4 App. Cas. (D. C.) 38; *Wells v. Haynes*, 101 Ga. 841, 28 S. E. 968. See also *supra*, §§ 447-449.

<sup>13</sup> *California*.—*Miller v. Ballerino*, 135 Cal. 566, 67 Pac. 1046, 68 Pac. 600; *Aydelotte v. Bloom*, 13 Cal. App. 56, 108 Pac. 877.

contract was permitted to prove and recover on a *quantum meruit* where it was apparent that the defendant was not prejudiced in maintaining a defense on the merits,<sup>14</sup> and in another case it was said that, even conceding that the complaint was upon a *quantum meruit*, "the only effect in such a case of proof of an express contract fixing the price is that the stipulated price becomes the *quantum meruit* in the case. It is not a question of variance, but only of the mode of proof of the allegations of the pleading."<sup>15</sup> Then, too, in many instances one may extricate himself from the consequences of careless pleading by amendment, or avoid it by a joinder of counts.

### *Evidence Generally.*

§ 501. **Burden of Proof.** — In actions for compensation the plaintiff must establish his case<sup>16</sup> by a fair preponderance of the evidence;<sup>17</sup> thus, he must prove an employment,<sup>18</sup> the perform-

*Colorado.*—Fairbanks *v.* Weeber, 15 Colo. App. 268, 62 Pac. 368.

*Illinois.*—Hughes *v.* Ferriman, 119 Ill. App. 169.

*Missouri.*—Brownrigg *v.* Massengale, 97 Mo. App. 190, 70 S. W. 1103.

*New York.*—See Yuells *v.* Hyman, 84 N. Y. S. 460.

*Ohio.*—Scheinesohn *v.* Lemonek, 84 Ohio St. 424, Ann. Cas. 1912C 737, 95 N. E. 913.

*Oregon.*—West *v.* Eley, 39 Ore. 461, 65 Pac. 798.

<sup>14</sup> Skinner *v.* Busse, 38 Misc. 265, 11 N. Y. Ann. Cas. 156, 77 N. Y. S. 560.

<sup>15</sup> Fells *v.* Vestvali, 2 Keyes (N. Y.) 152; West *v.* Eley, 39 Ore. 461, 65 Pac. 798.

<sup>16</sup> *Arizona.*—See De Mund Lumber Co. *v.* Stilwell, 8 Ariz. 1, 68 Pac. 543.

*Colorado.*—Casserleigh *v.* Green, 28 Colo. 392, 65 Pac. 32, *affirming* 12 Colo. App. 515, 56 Pac. 189.

*Connecticut.*—Seeley *v.* North, 16 Conn. 92.

*Illinois.*—Brown *v.* Cragg, 230 Ill. 299, 82 N. E. 569, *reversing* 129 Ill. App. 597.

*Iowa.*—Stanton *v.* Clinton, 52 Ia. 109, 2 N. W. 1027.

*Kentucky.*—Loomis *v.* Mullins, 101 S. W. 913.

*Louisiana.*—Durand *v.* Landry, 120 La. 513, 45 So. 409.

*Maine.*—Wright *v.* Fairbrother, 81 Me. 38, 16 Atl. 330.

*Nebraska.*—Saxton *v.* Harrington, 52 Neb. 300, 72 N. W. 272; Marshall *v.* Piggott, 78 Neb. 722, 111 N. W. 592.

*New York.*—Dickerson *v.* Mashek Engineering Co., 76 Misc. 263, 134 N. Y. S. 940; Davis *v.* Fischer, 90 N. Y. S. 301.

*Texas.*—Lynch *v.* Munson, 59 S. W. 603, 61 S. W. 140.

<sup>17</sup> Parker *v.* Esch, 5 Wash. 296, 31 Pac. 754.

<sup>18</sup> See *infra*, §§ 507–522.

ance of professional services thereunder,<sup>19</sup> and the value thereof;<sup>20</sup> and the evidence offered for these purposes must be material to the issues introduced by the pleadings,<sup>1</sup> and otherwise competent.<sup>2</sup>

But it rests with the defendant to establish matters of affirmative defense,<sup>3</sup> such as negligence on the part of the attorney,<sup>4</sup> or that the fee charged was unreasonably excessive,<sup>5</sup> or that the contract for compensation was champertous, or otherwise tainted with illegality.<sup>6</sup> But, in this connection, it will be recalled that in some jurisdictions a recovery may be had on a *quantum meruit* for services performed under contracts which were, in fact, void or voidable because of illegality.<sup>7</sup> Defenses generally will be considered later.<sup>8</sup>

There is some difference of opinion as to whether an attorney who sues on a contract for compensation must prove, as part of his case in chief, that the contract was fairly made and honestly entered into by the client, and that no undue advantage was taken of the client's ignorance either of the law, or of facts known to the attorney. In some cases proof of this character has been required,<sup>9</sup> especially where the contract was entered into after the relation of attorney and client had been established;<sup>10</sup> in other cases—and this seems to be the better view—it is held that the fairness of a contract for compensation, and the reasonable-

<sup>19</sup> See *infra*, §§ 523-528.

<sup>20</sup> See *infra*, §§ 529-544.

<sup>1</sup> See the preceding section.

<sup>2</sup> *Crowell v. Truax*, 94 Mich. 585, 54 N. W. 384; *Lamprey v. Langevin*, 25 Minn. 122; *Dempsey v. Wells*, 109 Mo. App. 470, 84 S. W. 1015.

<sup>3</sup> *Harlan v. Lambert*, 19 Cal. App. 349, 125 Pac. 1079; *Taussig v. St. Louis & K. R. Co.*, 186 Mo. 269, 85 S. W. 378; *Pickett v. Gore*, (Tenn.) 58 S. W. 402; *Sessions v. Warwick*, 46 Wash. 165, 89 Pac. 482; *Conover v. Carpenter*, 57 Wash. 146, 106 Pac. 620.

<sup>4</sup> *Priest v. Dodsworth*, 235 Ill. 613,

14 Ann. Cas. 340, 85 N. E. 940. And see *infra*, § 553.

<sup>5</sup> *Tabet v. Powell*, (Tex.) 78 S. W. 997. And see also *supra*, §§ 428-532.

<sup>6</sup> *Hadlock v. Brooks*, 178 Mass. 425, 59 N. E. 1009.

As to champerty generally, see *supra*, §§ 379-399; and as to other matters which may render contracts for compensation void or voidable, see *supra*, §§ 433-437.

<sup>7</sup> See *supra*, § 438.

<sup>8</sup> See *infra*, § 551 et seq.

<sup>9</sup> *Blaikie v. Post*, 137 App. Div. 648, 122 N. Y. S. 292.

<sup>10</sup> *Shirk v. Neible*, 156 Ind. 66, 59 N. E. 281, 83 Am. St. Rep. 150.

ness of the fees agreed upon, will be presumed, in the absence of evidence to the contrary, or apparent excessiveness,<sup>11</sup> and, *a fortiori*, will these presumptions prevail where the contract for compensation was made when the attorney was retained.<sup>12</sup> In this connection it is advisable to consult the previous discussion of this subject.<sup>13</sup>

A verdict against the weight of the evidence will not be sustained.<sup>14</sup>

**§ 502. Record as Evidence.**—The record of the cause or proceeding wherein professional services have been rendered is, as a general rule, admissible in evidence as tending to show the amount of compensation to which the attorney is entitled;<sup>15</sup> and it is immaterial, in this respect, whether the plaintiff was, or was not, sole counsel in the cause.<sup>16</sup> So, also, record evidence may be introduced for the purpose of establishing the fact of the plaintiff's employment,<sup>17</sup> the performance of services thereunder,<sup>18</sup>

<sup>11</sup> *Weil v. Fineran*, 78 Ark. 87, 93 S. W. 568; *Ramage v. Littlejohn*, 17 Wash. 386, 49 Pac. 486.

<sup>12</sup> *Boyd v. Daily*, 85 App. Div. 581, 83 N. Y. S. 539, *affirmed* 176 N. Y. 556, 613, 68 N. E. 1114.

<sup>13</sup> See *supra*, §§ 428-432.

<sup>14</sup> *Hopkinson v. Jones*, 28 Ill. App. 409; *Loomis v. Mullins*, 101 S. W. 913, 31 Ky. L. Rep. 231; *Samuels v. Simpson*, 144 App. Div. 466, 129 N. Y. S. 534; *Myers v. Baehraeh*, 110 N. Y. S. 872; *Cohen v. Gertner*, 116 N. Y. S. 712.

<sup>15</sup> *Indiana*.—*Duckwall v. Williams*, 29 Ind. App. 659, 63 N. E. 232.

*Kentucky*.—*Gaylord v. Nelson*, 7 Ky. L. Rep. 821.

*Louisiana*.—*Cullom v. Mock*, 21 La. Ann. 687; *Rutland v. Cobb*, 32 La. Ann. 857.

*Massachusetts*.—*Cooke v. Plaisted*, 176 Mass. 374, 57 N. E. 687.

*Missouri*.—*Dempsey v. Schawacker*, 110 Mo. 680, 38 S. W. 954, 41 S. W. 1100.

As to proof of the value of services generally, see *infra*, §§ 529-544.

<sup>16</sup> *Thorp v. Ramsey*, 51 Wash. 530, 99 Pac. 584.

<sup>17</sup> *Indiana*.—*Indianapolis Chair Mfg. Co. v. Swift*, 132 Ind. 197, 31 N. E. 800; *Stringer v. Breen*, 7 Ind. App. 557, 34 N. E. 1015.

*Louisiana*.—*Roselius v. Delachaise*, 5 La. Ann. 481, 52 Am. Dec. 597.

*Nevada*.—*Mitchell v. Bromberger*, 1 Nev. 604.

*New York*.—*Beneville v. Whalen*, 14 Daly 508, 2 N. Y. S. 20.

*Washington*.—*Kiefer v. Lara*, 56 Wash. 43, 104 Pac. 1102.

As to proof of employment generally, see *infra*, §§ 507-522.

<sup>18</sup> *Roraback v. Pennsylvania Co.*, 58 Conn. 292, 20 Atl. 465; *Duckwall v. Williams*, 29 Ind. App. 650, 62 N. E. 232; *Dempsey v. Schawacker*, 140 Mo. 680, 38 S. W. 954, 41 S. W. 1100; *Stark v. Hill*, 31 Mo. App. 101.

the nature and extent thereof,<sup>19</sup> and the amount involved therein.<sup>20</sup>

### § 503. Right of Plaintiff to Practice as Attorney at Law.

— As a general rule, the plaintiff, in order to recover compensation for professional services, must show that, at the time the services were rendered, he was a practicing lawyer, and had complied with the statutory requirements and rules of court for the regulation of such occupation.<sup>1</sup> It has been held, however, that evidence of this character is called for only where the question of the attorney's qualification to practice is raised by the pleadings,<sup>2</sup> and also that the rule requiring proof of qualification does not apply to a suit for the recovery of disbursements only,<sup>3</sup> or for the recovery of compensation rendered in a capacity other than that of an attorney at law.<sup>4</sup> This subject has been discussed heretofore.<sup>5</sup>

**§ 504. Declarations and Admissions.** — It is competent to introduce evidence of declarations and admissions by either party which have a tendency to establish the issues involved,<sup>6</sup> excepting where they are self-serving.<sup>7</sup> Thus, declarations and admissions by the client may be shown for the purpose of proving that he had entered into a contract of employment with the plaintiff.<sup>8</sup>

As to proof of the performance of services generally, see *infra*, §§ 523–528.

<sup>19</sup> *Davis v. Walker*, 131 Ala. 204, 31 So. 554; *McFadden v. Ferris*, 6 Ind. App. 454, 32 N. E. 107.

As to proof of the nature and extent of services generally, see *infra*, § 535.

<sup>20</sup> *McFadden v. Ferris*, 6 Ind. App. 454, 32 N. E. 107.

As to proof of the amount involved generally, see *infra*, § 537.

<sup>1</sup> *Humphreys v. Harvey*, 1 Bing. N. Cas. 62, 27 E. C. L. 312; *Williams v. Jones*, 2 Q. B. 276, 42 E. C. L. 673; *Perkins v. McDuffee*, 63 Me. 181;

*Ames v. Gilman*, 10 Mete. (Mass.) 239.

<sup>2</sup> *Bachman v. O'Reilly*, 14 Colo. 433, 24 Pac. 546. See also *Mulligan v. Smith*, 32 Colo. 404, 76 Pac. 1063.

<sup>3</sup> *Perkins v. McDuffee*, 63 Me. 181.

<sup>4</sup> *Mulligan v. Smith*, 32 Colo. 404, 76 Pac. 1063.

<sup>5</sup> See *supra*, § 23.

<sup>6</sup> *Shain v. Forbes*, 82 Cal. 577, 23 Pac. 198; *Manning v. Osgood*, 151 Mass. 148, 23 N. E. 732; *Crowell v. Truax*, 94 Mich. 585, 54 N. W. 384.

<sup>7</sup> *Tiffany v. Morgan*, (R. I.) 73 Atl. 465.

<sup>8</sup> *Fowler v. Iowa Land Co.*, 18 S. D. 131, 99 N. W. 1095.

and the rendition of services thereunder,<sup>9</sup> and the value thereof.<sup>10</sup> So, evidence of this character is competent to show that the client was indebted to the attorney,<sup>11</sup> the amount of such indebtedness,<sup>12</sup> and the reasonableness thereof.<sup>13</sup> Declarations and admissions by the duly authorized agent of either party are also admissible,<sup>14</sup> but those of third persons are not,<sup>15</sup> excepting, possibly, by way of rebuttal.<sup>16</sup> Admissions and stipulations generally have been considered heretofore.<sup>17</sup>

**§ 505. Bill Rendered as Evidence.** — A bill rendered by an attorney to his client for the value of professional services performed by him, may be introduced in evidence by the defendant as bearing on the question of the amount to which the plaintiff is entitled; but, where there has been no payment or settlement of the account, the bill rendered will not preclude the plaintiff from showing that his services were worth more than the amount of the bill, and recovering just compensation.<sup>18</sup> It has been held,

<sup>9</sup> *Brewster v. Manning*, 6 Hun (N. Y.) 530.

<sup>10</sup> *Brewster v. Manning*, 6 Hun (N. Y.) 530.

<sup>11</sup> *Wharton v. Cain*, 50 Ala. 408; *Hallam v. Bardsley*, 7 Ky. L. Rep. 516.

<sup>12</sup> *Proulx v. Stetson & Post Mill Co.*, 6 Wash. 478, 33 Pac. 1067.

<sup>13</sup> *Tong v. Orr*, 44 Ind. App. 681, 87 N. E. 147, *affirmed on rehearing* 44 Ind. App. 687, 88 N. E. 308; *Boyd v. Daily*, 85 App. Div. 581, 83 N. Y. S. 539, *affirmed* 176 N. Y. 556, 613, 68 N. E. 1114; *Randall v. Packard*, 1 Misc. 344, 20 N. Y. S. 716.

<sup>14</sup> *Fowler v. Iowa Land Co.*, 18 S. D. 131, 99 N. W. 1095.

<sup>15</sup> *Walbridge v. Barrett*, 118 Mich. 433, 76 N. W. 973, wherein it was held that the introduction in evidence of a declaration by the trial judge that the attorney (plaintiff) ought to have half of the judgment recov-

ered as compensation for his services, was prejudicial error.

<sup>16</sup> In *Hunneman v. Phelps*, 199 Mass. 15, 85 N. E. 169, it appears that the declaration of a judge to a third person was admitted in evidence for the purpose of rebutting a contention that the plaintiff had applied for a guardian *ad litem* in bad faith.

<sup>17</sup> See *supra*, §§ 258-265.

<sup>18</sup> *Illinois*.—*Bruce v. Dickey*, 116 Ill. 527, 6 N. E. 435.

*Indiana*.—*Miller v. Beal*, 26 Ind. 234.

*Michigan*.—*Romeyn v. Campau*, 17 Mich. 327.

*Minnesota*.—*Allis v. Day*, 14 Minn. 516; *Wilson v. Minneapolis & N. W. R. Co.*, 31 Minn. 481, 18 N. W. 291; *Wilkinson v. Crookston*, 75 Minn. 184, 77 N. W. 797.

*Missouri*.—*Webster v. Loeb*, 112 Mo. App. 139, 86 S. W. 463.

however, that the plaintiff cannot recover a greater sum than that specified in the bill rendered,<sup>19</sup> especially where the rendition of the bill was not accompanied by, or in pursuance of, a proposition for the compromise of differences,<sup>20</sup> or where a final settlement has been had.<sup>1</sup>

**§ 506. Weight of Evidence.**—The weight of the evidence and the credibility of the witnesses are questions of fact which it is the province of the jury to determine,<sup>2</sup> and, as a general rule, this is also true as to evidence of the reasonable value of an attorney's services, notwithstanding the testimony of experts on

*Nebraska*.—*People's Nat. Bank v. Geisthardt*, 55 Neb. 232, 75 N. W. 582.

*New York*.—*Williams v. Glenny*, 16 N. Y. 389; *Bratt v. Scott*, 63 Hun 632 mem., 18 N. Y. S. 507; *Breen v. Union R. Co.*, 9 App. Div. 122, 75 N. Y. St. Rep. 615, 41 N. Y. S. 164.

*Ohio*.—*Kittredge v. Armstrong*, 11 Ohio Dec. (Reprint) 661, 28 Cinc. L. Bul. 249.

*Vermont*.—*Hard v. Burton*, 62 Vt. 314, 20 Atl. 269.

<sup>19</sup> *Flower's Succession*, 3 La. Ann. 292.

<sup>20</sup> *Ingersoll v. Morse*, 33 Miss. 667.

<sup>1</sup> *Coopwood v. Wallace*, 12 Ala. 790; *Phenix Ins. Co. v. McKenzie*, 38 Ill. App. 630.

<sup>2</sup> *United States*.—*Northern Pac. R. Co. v. Clarke*, 106 Fed. 794, 45 C. C. A. 635; *Gilmore v. McBride*, 156 Fed. 464, 84 C. C. A. 274.

*California*.—*Coonan v. Loewenthal*, 129 Cal. 197, 61 Pac. 940; *Aydelotte v. Bloom*, 13 Cal. App. 56, 108 Pac. 877.

*Connecticut*.—*Graves v. Lockwood*, 30 Conn. 276.

*Illinois*.—*National Home-Bldg. & Loan Assoc. v. Fifer*, 71 Ill. App. 295; *Beard v. Morgan*, 71 Ill. App.

564; *Hughes v. Ferriman*, 119 Ill. App. 169.

*Massachusetts*.—*Hubbard v. Woodbury*, 7 Allen 422.

*Michigan*.—*Howell v. Smith*, 108 Mich. 350, 66 N. W. 218.

*Minnesota*.—*White v. Esch*, 78 Minn. 264, 80 N. W. 976; *Geduey v. Ayers*, 111 Minn. 66, 126 N. W. 398.

*Missouri*.—*Cross v. Atchison, T. & S. F. R. Co.*, 141 Mo. 132, 42 S. W. 675; *Trimble v. Texarkana & Ft. S. R. Co.*, 199 Mo. 44, 97 S. W. 164; *Goldsmith v. St. Louis Candy Co.*, 85 Mo. App. 595; *Dillon v. McManus*, 121 Mo. App. 37, 97 S. W. 971; *Gabbert v. Penfield*, 125 Mo. App. 436, 102 S. W. 627; *Ottofy v. Winsor*, 137 Mo. App. 272, 119 S. W. 40; *Clay v. Brown*, 148 Mo. App. 541, 128 S. W. 803.

*Nebraska*.—*Brennan-Love Co. v. McIntosh*, 62 Neb. 522, 87 N. W. 327; *Cathers v. Linton*, 75 Neb. 420, 106 N. W. 468.

*New York*.—*Richards v. Washburn*, 14 App. Div. 237, 43 N. Y. S. 615; *McDonald v. De Vito*, 118 App. Div. 566, 103 N. Y. S. 508; *Steele v. Hammond*, 136 App. Div. 667, 121 N. Y. S. 589; *Holm v. Parmele-Eccleston Co.*, 13 Misc. 317, 34 N. Y. S. 458;

that question,<sup>3</sup> excepting where counsel fees are fixed by the court.<sup>4</sup>

### *Proof of Employment.*

§ 507. **Necessity of Proving Employment.**—An attorney's claim for compensation necessarily rests on a contract of employment, either express or implied,<sup>5</sup> in his professional capacity;<sup>6</sup> and, therefore, in an action for its recovery it is essential that the fact of such employment should be established,<sup>7</sup> or that

*Leavitt v. Chase*, 59 Super. Ct. 230, 13 N. Y. S. 883; *Reves v. Hyde*, 14 Daly 431, 14 N. Y. St. Rep. 689.

*Pennsylvania*.—*Playford v. Hutcheson*, 135 Pa. St. 426, 19 Atl. 1019.

*Texas*.—*Britt v. Burghart*, 16 Tex. Civ. App. 78, 41 S. W. 389; *Sanborn v. Plowman*, 20 Tex. Civ. App. 484, 49 S. W. 639; *Railey v. Davis*, 128 S. W. 434.

*Washington*.—*Proulx v. Stetsen & Post Mill Co.*, 6 Wash. 478, 33 Pac. 1067; *Steel v. Gordon*, 14 Wash. 521, 45 Pac. 151.

See also *infra*, § 565.

<sup>3</sup> See *infra*, § 550.

<sup>4</sup> See *infra*, § 544.

<sup>5</sup> *Alabama*.—*Jackson v. Clopton*, 66 Ala. 29; *Humes v. Decatur Land Improvement & Furnace Co.*, 98 Ala. 471, 13 So. 368; *Irvin v. Strother*, 163 Ala. 484, 50 So. 969.

*Illinois*.—*Chicago, St. C. & M. R. Co. v. Larned*, 26 Ill. 218; *Price v. Hay*, 132 Ill. 543, 24 N. E. 620; *Evans v. Mohr*, 153 Ill. 561, 39 N. E. 1083.

*Indiana*.—*Miles v. De Wolf*, 8 Ind. App. 153, 34 N. E. 114.

*Iowa*.—*Ellwood v. Wilson*, 21 Ia. 523; *Turner v. Myers*, 23 Ia. 391.

*Louisiana*.—*Wailes v. Brown's Succession*, 27 La. Ann. 411; *In re McPherson*, 129 La. 182, 55 So. 756.

*Maine*.—*Wright v. Fairbrother*, 81 Me. 38, 16 Atl. 330.

*Maryland*.—*Neighbors v. State*, 41 Md. 478.

*Michigan*.—*Fraser v. Haggerty*, 86 Mich. 521, 49 N. W. 616.

*New York*.—*Burghart v. Gardner*, 3 Barb. 64; *Brown v. Genet*, 63 How. Pr. 236; *Mellvaine v. Steinson*, 90 App. Div. 77, 85 N. Y. S. 889.

*Pennsylvania*.—*Newbaker v. Alricks*, 5 Watts 183; *Jones v. Woods*, 76 Pa. St. 408.

*South Carolina*.—*Nimmons v. Stewart*, 13 S. C. 445; *Ex p. Fort*, 36 S. C. 25, 15 S. E. 332. See also *Ex p. Lynch*, 25 S. C. 193.

*Tennessee*.—*Hume v. Commercial Bank*, 13 Lea 496; *Johnson v. Williams*, 96 Tenn. 339, 34 S. W. 434.

As to contracts for compensation generally, see *supra*, §§ 417-438.

<sup>6</sup> *Cohen v. Gertner*, 116 N. Y. S. 712.

<sup>7</sup> *United States*.—*Herman v. Metropolitan St. R. Co.*, 121 Fed. 184.

*Alabama*.—*Davis v. Walker*, 131 Ala. 204, 31 So. 554; *Tisdale v. Troy*, 152 Ala. 566, 44 So. 601; *Irvin v. Strother*, 163 Ala. 484, 50 So. 969.

*Arkansas*.—*Davis v. Trimble*, 76 Ark. 115, 88 S. W. 920.



*California*.—Merrill *v.* Gunnison, 145 Cal. 544, 79 Pac. 67.

*Georgia*.—Simms *v.* Floyd, 65 Ga. 719; Mathews *v.* Giles, 108 Ga. 364, 33 S. E. 1006.

*Illinois*.—Chicago, St. C. & M. R. Co. *v.* Larned, 26 Ill. 218; Price *v.* Hay, 132 Ill. 543, 24 N. E. 620; Tascott *v.* Grace, 12 Ill. App. 639.

*Indiana*.—Hersleb *v.* Moss, 28 Ind. 354; Stringer *v.* Breen, 7 Ind. App. 557, 34 N. E. 1015; Miles *v.* De Wolf, 8 Ind. App. 153, 34 N. E. 114; Cleveland, C. & St. L. R. Co. *v.* Shrum, 24 Ind. App. 96, 55 N. E. 515; Blakey *v.* New York Life Ins. Co., 28 Ind. App. 428, 63 N. E. 47; Duckwall *v.* Williams, 29 Ind. App. 650, 63 N. E. 232.

*Iowa*.—Mabry *v.* Cheadle, 80 N. W. 312.

*Kentucky*.—Savings Bank of Cincinnati *v.* Benton, 2 Metc. 240; Weldon *v.* Finley, 104 S. W. 701, 31 Ky. L. Rep. 1050.

*Louisiana*.—Roselius *v.* Delachaise, 5 La. Ann. 481, 52 Am. Dec. 597; Cooley *v.* Cecile, 8 La. Ann. 51; Michon *v.* Gravier, 11 La. Ann. 596; Forman *v.* Sewerage & Water Board, 119 La. 49, 12 Ann. Cas. 773 (and see note at p. 776), 43 So. 908; Dreifus *v.* Colonial Bank & Trust Co., 127 La. 1086, 54 So. 358.

*Maine*.—Smith *v.* Lyford, 24 Me. 147; Prentiss *v.* Kelley, 41 Me. 436; Wright *v.* Fairbrother, 81 Me. 38, 16 Atl. 330.

*Massachusetts*.—Pew *v.* Gloucester First Nat. Bank, 130 Mass. 391.

*Michigan*.—McCutecheon *v.* Loud, 71 Mich. 433, 39 N. W. 569; Fraser *v.* Haggerty, 86 Mich. 521, 49 N. W. 616; Lillis *v.* Pennsylvania Casualty Co., 131 Mich. 301, 91 N. W. 165, 9 Detroit Leg. N. 315.

*Minnesota*.—White *v.* Esch, 78 Minn. 264, 80 N. W. 976.

*Mississippi*.—Rives *v.* Patty, 74 Miss. 381, 20 So. 862, 60 Am. St. Rep. 510; Southern Home Building & Loan Assoc. *v.* Butt, 77 Miss. 944, 28 So. 725.

*Missouri*.—Warder *v.* Seitz, 157 Mo. 140, 57 S. W. 537.

*Montana*.—McHatton *v.* Girard, 41 Mont. 387, 109 Pac. 704.

*Nebraska*.—Saxton *v.* Harrington, 52 Neb. 300, 72 N. W. 272.

*New York*.—Burghart *v.* Gardner, 3 Barb. 64; Hotchkiss *v.* Le Roy, 9 Johns. 142; Richards *v.* Washburn, 14 App. Div. 237, 43 N. Y. S. 615; Kellogg *v.* Rowland, 40 App. Div. 416, 57 N. Y. S. 1064; Williams *v.* Lewis, 45 App. Div. 623, 60 N. Y. S. 804; Whitesell *v.* New Jersey & H. R. R. & F. Co., 68 App. Div. 82, 74 N. Y. S. 217; Altkrug *v.* Horowitz, 111 App. Div. 420, 97 N. Y. S. 716; Kneeland *v.* Hurdy, 97 N. Y. S. 957; Newlin *v.* Carbon Steel Co., 110 N. Y. S. 921; Mains *v.* Gethen, 111 N. Y. S. 598.

*Ohio*.—Dorsey *v.* Goodenow, Wright 120.

*Pennsylvania*.—Jones *v.* Woods, 76 Pa. St. 410.

*South Carolina*.—Westmoreland *v.* Martin, 24 S. C. 238.

*Texas*.—Morris *v.* Kesterson, 88 S. W. 277.

*Vermont*.—Smith *v.* Dougherty, 37 Vt. 530; Safford *v.* Vermont & C. R. Co., 60 Vt. 185, 14 Atl. 91; Powell *v.* Concord First Nat. Bank, 71 Vt. 462, 45 Atl. 1036.

*Washington*.—McKay *v.* Atkinson, 55 Wash. 591, 104 Pac. 806.

*Wisconsin*.—Millett *v.* Hayford, 1 Wis. 401; Randall *v.* State, 16 Wis. 340.

the attorney's acts, if unauthorized, should be ratified or acquiesced in,<sup>8</sup> or the benefits of his services knowingly accepted.<sup>9</sup> It is essential also that the attorney should have been employed to render the particular services for which compensation is claimed;<sup>10</sup> but where there is proof of a general employment, it is not necessary to prove an employment for each item.<sup>11</sup> A conflict of evidence as to either of these matters presents a question of fact.<sup>12</sup> The employment of law partnerships has been discussed heretofore.<sup>13</sup>

§ 508. *Mode of Proof.*—It has been stated heretofore, in discussing the sufficiency of a retainer, that the employment of an attorney did not differ in any material respect from the employment of other agents.<sup>14</sup> A similar analogy exists as to the mode of proving such employment, and, therefore, an attorney's employment may be proved by any evidence which has a tendency to establish that fact.<sup>15</sup> Thus, it has been held proper to receive evidence of a previous employment by the same client, for the purpose of showing the relations existing between the parties, and as leading up to the employment for which compensation was claimed, although the two employments had no direct connection with each other.<sup>16</sup> The attorney is a competent witness in his own behalf in this respect, and, therefore, he may establish the

<sup>8</sup> See *infra*, § 517.

<sup>9</sup> See *infra*, §§ 518, 519.

<sup>10</sup> *Hopkins v. Mallard*, 1 G. Greene (Ia.) 117.

<sup>11</sup> *Stewart v. Emerson*, 70 Mo. App. 482.

<sup>12</sup> *Bissell v. Zorn*, 122 Mo. App. 688, 99 S. W. 458. See also *infra*, § 565.

<sup>13</sup> See *supra*, §§ 471-474.

<sup>14</sup> See *supra*, § 135; and as to retainers generally, see *supra*, §§ 133, 134. See also *Mellon v. Fulton*, 22 Okla. 636, 98 Pac. 911, 19 L.R.A. (N.S.) 960, quoting *Detroit v. Whittemore*, 27 Mich. 281.

<sup>15</sup> *California*.—*Kelly v. Ning Yung Benev. Ass'n*, 2 Cal. App. 460, 84 Pac. 321.

*New Hampshire*.—*Goodall v. Bedel*, 20 N. H. 205.

*New Jersey*.—*Wilson v. Seeher*, 72 N. J. Eq. 523, 66 Atl. 909.

*New York*.—See *Welti v. Cohen*, 157 App. Div. 65, 141 N. Y. S. 670.

*Texas*.—*Fore v. Chandler*, 24 Tex. 146.

*Wisconsin*.—*White v. Lueps*, 55 Wis. 222, 12 N. W. 376. And see the section following.

<sup>16</sup> *Malry v. Cheadle*, (1a.) 80 N. W. 312.

fact of his own employment.<sup>17</sup> So, also, that fact may be established by the testimony of any other competent witness,<sup>18</sup> by a writing<sup>19</sup> or by the record in the cause,<sup>20</sup> or by the admissions or declarations of the client.<sup>1</sup> The evidence must, of course, be material to the issues involved, and otherwise competent, in all cases.<sup>2</sup> In some instances it is not necessary to prove the original employment,<sup>3</sup> providing the attorney can establish an acquiescence, by the client, in his acts,<sup>4</sup> or an acceptance of the benefits of the services rendered by him.<sup>5</sup> An employment will be presumed in an action to recover an attorney's fee which was allowed in another case.<sup>6</sup> So, there are cases wherein a promise to pay may be inferred from the relations of the parties and the circumstances in the case; thus, for instance, where professional services are rendered to a minor, a promise to pay therefor may be presumed on the part of the father.<sup>7</sup> But the father cannot be made liable for the services of an attorney rendered as guardian *ad litem* for his infant children, in proceedings in the probate courts, where his interests and those of the children are conflicting.<sup>8</sup>

### § 509. What Constitutes Employment Generally. —

An attorney's employment may, of course, be established by proof of an express contract therefor.<sup>9</sup> No particular formality is required. It will be sufficient to show that professional services were rendered by the attorney at the request of the client.<sup>10</sup> Thus,

<sup>17</sup> *Schlicht v. Stivers*, 61 Ia. 746, 16 N. W. 74; *Chamberlain v. Rodgers*, 79 Mich. 219, 44 N. W. 598.

<sup>18</sup> *White v. Lueps*, 55 Wis. 222, 12 N. W. 376.

<sup>19</sup> *Fitzpatrick v. Howard*, 148 App. Div. 802, 133 N. Y. S. 345.

<sup>20</sup> See *supra*, § 502, note.

<sup>1</sup> See *supra*, § 504.

<sup>2</sup> *Davis v. Walker*, 131 Ala. 204, 31 So. 554; *Wright v. Gillespie*, 43 Mo. App. 244.

<sup>3</sup> *Hotchkiss v. Le Roy*, 9 Johns. (N. Y.) 142.

<sup>4</sup> See *infra*, § 517.

<sup>5</sup> See *infra*, § 518.

<sup>6</sup> *Ramage v. Littlejohn*, 17 Wash. 386, 49 Pac. 486.

<sup>7</sup> *Hill v. Childress*, 10 Yerg. (Tenn.) 515.

<sup>8</sup> *Thorn v. Beard*, 60 Hun 579 mem., 14 N. Y. S. 339.

<sup>9</sup> See *supra*, § 417. And see also, as to contracts for compensation generally, and matters affecting the validity thereof, *supra*, §§ 418-438.

<sup>10</sup> *Brennan-Love Co. v. McIntosh*, 62 Neb. 522, 87 N. W. 327; *Mitchell v. Bromberger*, 1 Nev. 604; *Tindol v. Beasley*, (Tex.) 40 S. W. 155; *Isham v. Parker*, 3 Wash. 755, 29 Pac. 835.

where an attorney states to his client that he will conduct a certain case for a specified sum, and the latter replies that he may go ahead and take it up, there is a contract on the part of the client to pay the amount named, although he may be prosecuting the suit for the benefit of another.<sup>11</sup> So, also, in some instances, the employment of counsel will be presumed,<sup>12</sup> especially where the benefits of his services have been knowingly accepted.<sup>13</sup> But the mere fact that an attorney receives and credits certain payments as retainers, without the knowledge of the person who made such payments, does not show a retainer in fact.<sup>14</sup> Nor can an attorney establish the fact of his employment by showing that he acted for the client in a professional capacity, and that his authority to do so was recognized by the adverse party.<sup>15</sup> So, a resolution adopted by the officers of a corporation, and accepted by an attorney, to the effect "that the solicitor's salary shall begin when he is notified that his services are required by the company," is not evidence of the attorney's employment, or of his right to compensation for services rendered on the strength of the resolution, until he has, in fact, been notified that his services are required.<sup>16</sup> Nor does the mere fact that the name of an attorney appeared on the letter headings of a society, as one of its general committee, show conclusively that the society undertook to pay him for the rendition of professional services in its behalf.<sup>17</sup>

**§ 510. Authority to Employ Generally.**—Where the employment has been effected by an agent, or other representative of the client, it is incumbent on the attorney, if he sues for his compensation, to prove that the person by whom he was employed was duly authorized by the client so to act,<sup>18</sup> or that the employ-

<sup>11</sup> *Bell v. Smith*, 28 Ill. App. 181.

<sup>12</sup> See the preceding section, notes 6, 7.

<sup>13</sup> See *infra*, § 518.

<sup>14</sup> *Blair v. Columbian Fireproofing Co.*, 191 Mass. 333, 77 N. E. 762.

<sup>15</sup> *Hotchkiss v. Le Roy*, 9 Johns. (N. Y.) 142.

<sup>16</sup> *Fitzpatrick v. Lincoln Savings &*

*Trust Co.*, 194 Pa. St. 544, 45 Atl. 333.

<sup>17</sup> *Williams v. Lewis*, 45 App. Div. 623, 60 N. Y. S. 804.

<sup>18</sup> *United States*.—*Orr v. Brown*, 74 Fed. 1004, 41 U. S. App. 486, 21 C. C. A. 195.

*Georgia*.—*Mathews v. Giles*, 108 Ga. 364, 33 S. E. 1006.

ment, if unauthorized, was subsequently ratified,<sup>19</sup> or the benefits of his services knowingly accepted.<sup>20</sup> Consideration has been given, heretofore, as to who may employ counsel,<sup>21</sup> the authority of attorneys to appear for litigants,<sup>1</sup> and also the authority to employ associate counsel.<sup>2</sup> An authority to collect a claim usually carries with it the authority either to employ counsel for that purpose, or to appear as such.<sup>3</sup>

§ 511. **Employment by Representative Persons.** — The employment of an attorney by one who, without authority, assumes to act in the matter as the representative of another, as, for instance, an agent, guardian, executor, administrator, trustee, etc., is not binding on the person in whose behalf the employment was effected,<sup>4</sup> unless, of course, the unauthorized act is subsequently

*Iowa.*—Foster *v.* Clinton County, 51 Ia. 541, 2 N. W. 207.

*Louisiana.*—Barker *v.* York, 3 La. Ann. 90.

*Minnesota.*—Plymat *v.* Brush, 46 Minn. 23, 48 N. W. 443.

*Mississippi.*—Bush *v.* Southern Brewing Co., 69 Miss. 200, 13 So. 856.

*Nebraska.*—Saxton *v.* Harrington, 52 Neb. 300, 72 N. W. 272.

*New York.*—Cochran *v.* Newton, 5 Denio 482; Harnett *v.* Garvey, 36 Super. Ct. 327; Thorn *v.* Beard, 60 Hun 579 mem., 14 N. Y. S. 339; Egan *v.* De Jonge, 113 N. Y. S. 737.

*Ohio.*—Dorsey *v.* Goodenow, Wright 120. See also Furst *v.* Muller, 5 Ohio Cir. Dec. 361, 11 Ohio Cir. Ct. 178.

*Pennsylvania.*—Com. *v.* Order of Solon, 192 Pa. St. 487, 43 Atl. 1084.

*South Carolina.*—Nimmons *v.* Stewart, 13 S. C. 445.

*South Dakota.*—Kirby *v.* Western Wheeled Scraper Co., 9 S. D. 623, 70 N. W. 1052.

*Wisconsin.*—Randall *v.* State, 16 Wis. 340.

<sup>19</sup> See *infra*, § 517.

<sup>20</sup> See *infra*, § 518.

<sup>21</sup> See *supra*, § 136.

<sup>1</sup> See *supra*, §§ 229–233.

<sup>2</sup> See *supra*, §§ 210, 407–409; and see *infra*, § 516.

<sup>3</sup> *Alabama.*—Compare Milligan *v.* Alabama Fertilizer Co., 89 Ala. 322, 7 So. 650.

*Georgia.*—Strong *v.* West, 110 Ga. 382, 35 S. E. 693.

*Kansas.*—Ryan *v.* Tudor, 31 Kan. 366, 2 Pac. 797.

*Kentucky.*—Jones *v.* Jones, 39 S. W. 251.

*Louisiana.*—Morgan *v.* Brown, 12 La. Ann. 159.

*New York.*—McMinn *v.* Richtmyer, 3 Hill 236.

*Pennsylvania.*—Swartz *v.* D. S. Morgan & Co., 163 Pa. St. 195, 29 Atl. 974, 975, 43 Am. St. Rep. 786.

As to the duty and liability of counsel with respect to the collection of claims, see generally *supra*, §§ 326–330.

<sup>4</sup> *Louisiana.*—Barker *v.* York, 3 La. Ann. 90.

ratified,<sup>5</sup> or the benefits of the attorney's services are knowingly accepted.<sup>6</sup> The mere fact that one claims to be the agent or other representative of another, and actually employs counsel for him, is not sufficient evidence of his authority to do so;<sup>7</sup> but where one is duly authorized to retain counsel for another, or where such authority exists as a matter of law, an employment by such representative will bind those for whom he acts.<sup>8</sup> In the absence of any special agreement, the general rule is that an attorney must look to those who employ him for his compensation for services rendered, even though, in truth, they act as the representatives of others;<sup>9</sup> and *a fortiori* will the person effecting the employment be personally responsible if he acts unauthorizedly.<sup>10</sup> But individual liability will not be enforced against one who employs counsel in his representative capacity only, and this is especially true where the amount due can be collected

*Maryland*.—Laroque *v.* Candolle, 4 Md. Ch. 347.

*Mississippi*.—Bush *v.* Southern Brewing Co., 69 Miss. 200, 13 So. 856.

*New York*.—Randall *v.* Dwight, 5 N. Y. St. Rep. 889.

*Vermont*.—Powell *v.* First Nat. Bank, 71 Vt. 462, 45 Atl. 1036.

*Washington*.—Abel *v.* Hansen, 62 Wash. 492, 114 Pac. 182. See also *supra*, § 136.

<sup>5</sup> See *infra*, § 517.

<sup>6</sup> See *supra*, § 518.

<sup>7</sup> Southern Home Building & Loan Ass'n *v.* Butt, 77 Miss. 944, 28 So. 725.

<sup>8</sup> *Alabama*.—Hilliard *v.* Carr, 6 Ala. 557.

*California*.—Dunlap *v.* Standard Consol. Min. Co., 61 Cal. 237.

*Colorado*.—Fillmore *v.* Wells, 10 Colo. 228, 15 Pac. 343, 3 Am. St. Rep. 567.

*Illinois*.—Price *v.* Hay, 132 Ill. 543, 24 N. E. 620.

*Indiana*.—Nave *v.* Salmon, 51 Ind. 159; Long *v.* Rodman, 58 Ind. 58.

*Mississippi*.—Keirn *v.* Carson, 12 Smedes & M. 431.

*New York*.—Kellogg *v.* Reese, 48 Hun 621 mem., 14 Civ. Proc. 283, 1 N. Y. St. 291.

*Pennsylvania*.—Appeal of Mander-son, 113 Pa. St. 631, 6 Atl. 893; Swartz *v.* D. S. Morgan & Co., 163 Pa. St. 195, 29 Atl. 974, 975, 43 Am. St. Rep. 786.

*Vermont*.—Foot *v.* Rutland & W. R. Co., 32 Vt. 633.

<sup>9</sup> Livermore *v.* Rand, 26 N. H. 85; Bowman *v.* Tallman, 27 How. Pr. 212, 2 Robt. 385, *affirmed* 41 N. Y. 619, 40 How. Pr. 1; Hallam *v.* Maxwell, 2 Cine. Super. Ct. (Ohio) 384, *reversing* 2 Cine. Super. Ct. 136; Playford *v.* Hutchinson, 135 Pa. St. 426, 19 Atl. 1019; McGloin *v.* Vanderlip, 27 Tex. 366; Paddock *v.* Kittredge, 31 Vt. 378.

<sup>10</sup> Charles *v.* Eshelman, 5 Colo. 107; Austin *v.* Monroe, 4 Laus. (N. Y.) 67.

from the person or estate represented.<sup>11</sup> Nor will public agents, who have been appointed under legislative enactment, be held personally responsible for the compensation of counsel retained by them, because, in such case, the attorney is bound to take notice of the capacity in which his clients act.<sup>12</sup>

**§ 512. Employment by Corporations and Stockholders Thereof.** — One who claims compensation for professional services rendered in the interests of a corporation must prove the fact of his employment,<sup>13</sup> as stated heretofore with respect to proof of employment by individuals.<sup>14</sup> Corporations may, of course, and frequently do employ counsel by a resolution duly passed by the board of directors and entered on the minutes, but no such formality is necessary; it will be sufficient for the attorney to show that some authorized person requested him to represent the company in a particular transaction, and that he did so.<sup>15</sup> So, a corporation may be bound in this respect by the acts of its agents, though not under the corporate seal; thus, where the president of a corporation gave a solicitor written authority to prosecute an appeal on its behalf, it was held that the corporation was bound thereby.<sup>16</sup> And one corporation may so own and control another corporation as to render such other liable for the compensation of counsel employed by the controlling company, for services rendered in the interest of the company which was so controlled.<sup>17</sup> So, also, an attorney may recover his fees if his employment, though unauthorized, was subsequently ratified,<sup>18</sup>

<sup>11</sup> *Malville v. Kappeler*, (Cal.) 37 Pac. 934.

<sup>12</sup> *Butler v. Mitchell*, 15 Wis. 355.

<sup>13</sup> *Davis v. Trimble*, 76 Ark. 115, 88 S. W. 920; *Dreifus v. Colonial Bank & Trust Co.*, 127 La. 1086, 54 So. 358; *De Long v. Muskegon Booming Co.*, 88 Mich. 282, 50 N. W. 297; *Lillis v. Pennsylvania Casualty Co.*, 131 Mich. 301, 91 N. W. 165, 9 Detroit Leg. N. 315; *Parshley v. Third Methodist Episcopal Church*, 147 N. Y. 583, 42

N. E. 15, 30 L.R.A. 574, *affirming* 4 Misc. 302, 24 N. Y. S. 106.

<sup>14</sup> See *supra*, § 507.

<sup>15</sup> *Randolph v. St. Joseph, S. & N. R. Co.*, 118 Mo. App. 460, 94 S. W. 309; *Scott v. New York Filling Co.*, 79 N. J. L. 231, 75 Atl. 772.

<sup>16</sup> *American Ins. Co. v. Oakley*, 9 Paige (N. Y.) 496, 38 Am. Dec. 561.

<sup>17</sup> *Trimble v. Texarkana & Ft. S. R. Co.*, 199 Mo. 44, 97 S. W. 164.

<sup>18</sup> See *infra*, § 517.

or the benefits of his services were knowingly accepted.<sup>19</sup> In many jurisdictions attorneys employed by certain stockholders of corporations are entitled to compensation from the company's funds for their services, and this is especially true where the services were beneficial to all the stockholders.<sup>20</sup> So, under the local laws prevailing in several states, compensation may be recovered for professional services rendered in winding up proceedings.<sup>1</sup>

**§ 513. Employment by One of Several Parties as Creating Joint Liability.**—The fact that several persons are jointly interested in certain litigation does not, as a general rule, authorize any one of them to employ counsel at the expense of the other joint litigants, or parties in interest.<sup>2</sup> Nor, in such case, will the mere fact that the attorney's services were beneficial to all the parties render them liable for his compensation,<sup>3</sup> because the principle upon which implied contracts are sustained is not merely that one party has done work which benefits another, but also that such other party, knowing that services are being performed for his benefit and on his account, makes no objection, but permits the continuance thereof.<sup>4</sup> And where several joint parties have separate counsel, each of them may suppose that such counsel will act together for the mutual benefit of all, and that, at the same

<sup>19</sup> See *infra*, § 518.

<sup>20</sup> *Davis v. Gemmell*, 73 Md. 530, 21 Atl. 712; *Kanneberg v. Evangelical Creed Cong.*, 146 Wis. 610, Ann. Cas. 1912C 376, 131 N. W. 353, 39 L.R.A. (N.S.) 138. See also *supra*, §§ 477, 478.

<sup>1</sup> *Whitsett v. City Building & Loan Assoc.*, 3 Tenn. Ch. 526.

<sup>2</sup> *United States*,—*Adriatic F. Ins. Co. v. Treadwell*, 108 U. S. 361, 2 S. Ct. 772, 27 U. S. (L. ed.) 754.

*Georgia*,—*Simms v. Floyd*, 65 Ga. 719.

*Illinois*,—*Chicago, St. C. & M. R. Co. v. Larned*, 26 Ill. 220.

*Kansas*,—*Muscott v. Stubbs*, 24 Kan. 520.

*Kentucky*,—*Thirlwell v. Campbell*, 11 Bush 164; *Savings Bank of Cincinnati v. Benton*, 2 Mete. 240.

*Maine*,—*Smith v. Lyford*, 24 Me. 147.

*Maryland*,—*McGraw v. Canton*, 74 Md. 554, 22 Atl. 132, *distinguishing Davis v. Gemmell*, 73 Md. 530, 21 Atl. 712.

*Minnesota*,—*White v. Esch*, 78 Minn. 264, 80 N. W. 976.

*Pennsylvania*,—*Jones v. Woods*, 76 Pa. St. 408.

<sup>3</sup> *Savings Bank of Cincinnati v. Benton*, 2 Mete. (Ky.) 240. And see *infra*, § 518.

<sup>4</sup> *Muscott v. Stubbs*, 24 Kan. 520.



time, each attorney will look to his own client for compensation.<sup>5</sup> So, an agreement between several litigants, jointly interested, for the employment of counsel to represent all of them, and providing that each party shall pay its *pro rata* share of the expense, will bind the counsel so employed, provided, of course, that they had knowledge of the agreement.<sup>6</sup> Likewise a joint liability may be created by a joint employment,<sup>7</sup> notwithstanding a secret agreement between the parties whereby one of them agreed to pay all the attorney fees.<sup>8</sup> So, a joint liability may be created by the ratification of an unauthorized employment,<sup>9</sup> or by knowingly accepting the benefits of an attorney's services without objection.<sup>10</sup> And where a joint liability has been created, one who has paid more than his proportionate share of the attorney's compensation may compel contribution from his colitigants.<sup>11</sup>

### § 514. Employment by One of Several Heirs or Legatees.

—The principles stated in the preceding section are equally applicable here, for it is well settled that the employment of counsel by one of several heirs or legatees will not, of itself, create a liability on the part of the other heirs or legatees for the compensation of the counsel so employed,<sup>12</sup> even though his services were beneficial to all of them,<sup>13</sup> excepting where they have resulted in bringing a fund into court, and, under the local law, attorney fees may be allowed therefrom.<sup>14</sup> Nor will the employment of an attorney by an heir or legatee create a liability on the part of the estate involved.<sup>15</sup> But a joint liability may be created by

<sup>5</sup> *Muscott v. Stubbs*, 24 Kan. 520; *Radley v. Gaylor*, 98 App. Div. 158, 90 N. Y. S. 758; *Vilas v. Bundy*, 106 Wis. 168, 81 N. W. 812.

<sup>6</sup> *Adriatic Fire Ins. Co. v. Treadwell*, 108 U. S. 361, 2 S. Ct. 772, 27 U. S. (L. ed.) 754; *Tuttle v. Claffin*, 88 Fed. 122, 59 U. S. App. 602, 31 C. C. A. 419, *affirming* 86 Fed. 964.

<sup>7</sup> *Foster v. Burton*, 62 Vt. 239, 20 Atl. 326.

<sup>8</sup> *McCrary v. Ruddick*, 33 Ia. 521.

<sup>9</sup> See *infra*, § 517.

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<sup>10</sup> See *infra*, § 518.

<sup>11</sup> *Percy v. Clary*, 32 Md. 245.

<sup>12</sup> *Grimball v. Cruse*, 70 Ala. 534; *Cooley v. Cecile*, 8 La. Ann. 51; *Abel v. Hansen*, 62 Wash. 492, 114 Pac. 182. See also *Johnson v. Williams*, 96 Tenn. 338, 34 S. W. 434.

<sup>13</sup> *Grimball v. Cruse*, 70 Ala. 534.

<sup>14</sup> *In re Francis*, 5 Kulp (Pa.) 17. See also *supra*, 477, 478.

<sup>15</sup> *Grimball v. Cruse*, 70 Ala. 534; *Scott v. Dailey*, 89 Ind. 477; *In re Gray*, 7 W. N. C. (Pa.) 542.

the joint employment of counsel,<sup>16</sup> or by the ratification of an employment effected by another heir or legatee,<sup>17</sup> or by knowingly accepting the benefits of the services rendered.<sup>18</sup> So, the sole distributee of an estate may bind it by a contract for attorney fees.<sup>19</sup> But a minor heir or legatee cannot be bound by the fact that his guardian, without the permission of the court, entered into an agreement with other heirs or legatees for the joint employment of an attorney.<sup>20</sup>

**§ 515. Employment by Principal or Surety as Creating Joint Liability.** — It is well settled that the principal on a bail bond, or other such obligation, cannot, at the expense of the surety, retain counsel to defend a suit brought on the bond or recognizance, or to perform any other service in connection therewith;<sup>1</sup> nor can the surety on such an obligation employ counsel at the expense of the principal;<sup>2</sup> and it is immaterial, in either case, that the services rendered by the attorney were beneficial to both parties,<sup>3</sup> unless the facts are such that the law will imply a promise to pay for them.<sup>4</sup> It has been held that where one who has been arrested, and required to give bond for his appearance, leaves the state, and his surety employs an attorney to prosecute an appeal from the order of arrest, the testimony of the attorney as to conversations had with the surety as to whether the principal would probably return to the state is admissible, in an action against the surety for the attorney's services, as tending to show why the surety took upon himself the expense of further litigation.<sup>5</sup> But the deposition of the principal as to whether he had

<sup>16</sup> *Roll v. Mason*, 9 Ind. App. 651, 37 N. E. 298; *Adams v. Landrum*, 9 Ky. L. Rep. 287. See also *In re Francis*, 5 Kulp (Pa.) 17.

<sup>17</sup> See *infra*, § 517. And see also *Abel v. Hansen*, 62 Wash. 492, 114 Pac. 182.

<sup>18</sup> See *infra*, § 518.

<sup>19</sup> *In re Hageman*, 19 Phila. (Pa.) 75. 45 Leg. Int. 226.

<sup>20</sup> *Adams v. Landrum*, 9 Ky. L. Rep. 287.

<sup>1</sup> *Daly v. Hines*, 55 Ga. 470; *Turner v. Myers*, 23 Ia. 391; *Smith v. Lyford*, 24 Me. 147.

<sup>2</sup> *Smith v. Dougherty*, 37 Vt. 530.

<sup>3</sup> *Simms v. Floyd*, 65 Ga. 719; *Smith v. Lyford*, 24 Me. 147; *Smith v. Dougherty*, 37 Vt. 530.

<sup>4</sup> See *infra*, § 518.

<sup>5</sup> *Murphy v. Gates*, 81 Wis. 370, 51 N. W. 573.

employed an attorney, and how much he had agreed to pay him, is properly excluded where the case proceeds upon the theory that the surety had himself employed such attorney.<sup>6</sup>

**§ 516. Employment of Associate Counsel.**—The employment of associate counsel by the client differs in no material respect from the employment of the regular attorney, and, as to counsel so employed, the principles stated in the other sections of this subdivision are applicable.<sup>7</sup> Where, however, the original attorney undertakes to employ associate counsel, the situation presents other questions. It has been stated heretofore that, in the absence of authority from the client, the mere fact that one has been engaged to conduct litigation does not warrant the employment of associate counsel by him at his client's expense.<sup>8</sup> Therefore, in cases of this character, it is incumbent on associate counsel, in actions for their compensation, to prove that their employment by the original attorney was authorized by the client, or, if unauthorized, that it was subsequently ratified by him;<sup>9</sup> otherwise there can be no recovery from the client;<sup>10</sup> but the

<sup>6</sup> *Murphey v. Gates*, 81 Wis. 370, 51 N. W. 573.

<sup>7</sup> See *supra*, §§ 507-515, and see *infra*, §§ 517-522. See also *Emblem v. Bicksler*, 34 Colo. 496, 83 Pac. 636.

<sup>8</sup> See *supra*, §§ 210, 407.

<sup>9</sup> See *supra*, § 408, and see also *infra*, § 517.

<sup>10</sup> *California*.—*Porter v. Elizalde*, 125 Cal. 204, 57 Pac. 899.

*Georgia*.—*Mathews v. Giles*, 108 Ga. 364, 33 S. E. 1006.

*Illinois*.—*Price v. Hay*, 132 Ill. 543, 24 N. E. 620, *affirming* 29 Ill. App. 552, 31 Ill. App. 293; *Evans v. Mohr*, 153 Ill. 561, 39 N. E. 1083; *Continental Adjustment Co. v. Hoffman*, 123 Ill. App. 69.

*Indiana*.—*Brown v. Underhill*, 4 Ind. App. 77, 30 N. E. 430; *Moore v. Orr*, 10 Ind. App. 89, 37 N. E. 554.

*Iowa*.—*Antrobus v. Sherman*, 65 Ia. 230, 21 N. W. 579, 54 Am. Rep. 7.

*Kentucky*.—*Nevin v. Masonic Sav. Bank's Assignee*, 52 S. W. 811, 21 Ky. L. Rep. 596.

*Louisiana*.—*Jones v. Goza*, 16 La. Ann. 428; *Voorhies v. Harrison*, 22 La. Ann. 85.

*Michigan*.—*Fraser v. Haggerty*, 86 Mich. 521, 49 N. W. 616.

*Minnesota*.—*White v. Esch*, 78 Minn. 264, 80 N. W. 976.

*New Jersey*.—*Bentley v. Fidelity & Deposit Co. of Maryland*, 75 N. J. L. 828, 15 Ann. Cas. 1178, 69 Atl. 202, 127 Am. St. Rep. 837.

*New York*.—*Cook v. Ritter*, 4 E. D. Smith 253; *Macniffe v. Ludington*, 67 How. Pr. 13, 13 Abb. N. Cas. 407; *In re Bleakley*, 5 Paige 311; *Kneeland v. Hurdy*, 97 N. Y. S. 957.

attorney who employed them will, in the absence of an express agreement to the contrary, be responsible for their fees.<sup>11</sup>

If, however, the authority of the original attorney to effect the employment of associate counsel is established, the client will be liable for their fees,<sup>12</sup> although there was a secret agreement between him and the original attorney that such services should be paid for by the latter.<sup>13</sup> So, an attorney who is both agent and counsel for a party in managing a suit, may employ assistant counsel at the charge of his client.<sup>14</sup> And even where the original attorney has employed associate counsel without authority, the client will be responsible for his compensation if he accepts the benefits of his services with full knowledge of the facts;<sup>15</sup> but the mere failure of the client to object to the rendition of such services will not, of itself, create a liability on his part.<sup>16</sup>

### § 517. Ratification of Unauthorized Employment. —

It is well settled that the client may ratify the unauthorized employment of counsel or associate counsel to act for him, and, in this manner, render himself responsible for their fees as effectively as if he had personally conducted the negotiations leading up to the employment.<sup>17</sup> This is in accord with the principles,

*Vermont*.—*Paddock v. Colby*, 18 Vt. 485; *Willard v. Danville*, 45 Vt. 93.

<sup>11</sup> *Kersey v. O'Day*, 173 Mo. 560, 73 S. W. 481; *Scott v. Hoxsie*, 13 Vt. 50.

<sup>12</sup> *Illinois*.—*Price v. Hay*, 132 Ill. 543, 24 N. E. 620, *affirming* 29 Ill. App. 552, 31 Ill. App. 293.

*Indiana*.—*Nave v. Tucker*, 70 Ind. 15.

*Iowa*.—*McCrary v. Ruddick*, 33 Ia. 521.

*Massachusetts*.—*Aldrich v. Brown*, 103 Mass. 527.

*Nebraska*.—*Sedgwick v. Bliss*, 23 Neb. 617, 37 N. W. 483.

*Vermont*.—*Briggs v. Georgia*, 10 Vt. 68. And see also *supra*, § 409.

<sup>13</sup> *McCrary v. Ruddick*, 33 Ia. 521; *Brigham v. Foster*, 7 Allen (Mass.) 419.

<sup>14</sup> *Briggs v. Georgia*, 10 Vt. 68. And see also *supra*, § 510.

<sup>15</sup> *Alabama*.—*King v. Pope*, 28 Ala. 601.

*Arkansas*.—*Boynton v. Brown*, 103 Ark. 513, 145 S. W. 242.

*Indiana*.—*Hogate v. Edwards*, 65 Ind. 372.

*Iowa*.—*Dorr v. Dudley*, 135 Ia. 20, 112 N. W. 203.

*Minnesota*.—*White v. Esch*, 78 Minn. 264, 80 N. W. 976.

*Tennessee*.—*Yerger v. Aiken*, 7 Baxt. 539; *Callender v. Turpin*, 61 S. W. 1057.

*Texas*.—*Smith v. Lipscomb*, 13 Tex. 532. And see also *infra*, § 518.

<sup>16</sup> *Young v. Crawford*, 23 Mo. App. 432; *Briggs v. Georgia*, 10 Vt. 68.

<sup>17</sup> *Hood v. Ware*, 34 Ga. 328; *Cloud*

stated heretofore, applicable to the ratification of the unauthorized acts of attorneys who have been regularly retained.<sup>18</sup> Thus, where some of several persons who were interested in having a will set aside, employed attorneys for that purpose, and put forward one of their number as the nominal plaintiff, supposing that they were authorized to bind all the parties for attorney's fees, and the others, when informed of what had been done, took part in the preparation of the case, consulted with the attorneys, and made suggestions to them as to the trial, it was held that they had ratified the employment.<sup>19</sup> So, where certain attorneys, at the request of a town council, addressed a meeting of the citizens, explaining the terms upon which the holders of town bonds proposed to cancel them, and such proposal was accepted by the meeting, and the attorneys were directed to prepare an ordinance for the purpose of consummating the settlement, and the town council afterwards adopted the ordinance, and the bonds were taken up in pursuance thereof, and the whole matter adjusted with the assistance of the attorneys, it was held that they were entitled to recover pay from the town for their services.<sup>20</sup> And where a railroad company employed attorneys in a particular case, and before the determination thereof the road was leased and operated by another company, the fact that the later company continued to receive the services is sufficient to sustain a finding that it ratified the original employment.<sup>1</sup> Even silence on the part of the client, when he should speak, may amount to a ratification; thus where a director of a railroad company employed an attorney, and authorized him to engage local counsel to attend a suit in which the company was interested, it was held that the continued silence of the director, after receiving from the original attorney a report of his employment of the local counsel, was a ratification by him, and through him by the corporation, of the action of the original attorney.<sup>2</sup> Evidence of ratification is, of

*v. Taliaferro County*, 138 Ga. 214, 74 S. E. 1074; *Cooper v. Hamilton*, 52 Ill. 119; *McKay v. J. M. E. Atkinson & Co.*, 55 Wash. 591, 104 Pac. 806.

<sup>18</sup> See *supra*, §§ 211-214.

<sup>19</sup> *Holmes v. Holland*, 11 Ohio, Dec. (Reprint) 768, 29 Cine. L. Bul. 115.

<sup>20</sup> *New Athens v. Thomas*, 82 Ill. 259.

<sup>1</sup> *International & G. N. R. Co. v. Clark*, 81 Tex. 48, 16 S. W. 631.

<sup>2</sup> *Pittsburgh, C. & St. L. R. Co. v. Woolley*, 12 Bush (Ky.) 451.

course, subject to rebuttal by the defendant.<sup>3</sup> And even where ratification has been established, the client will not be bound by a contract entered into for him by the unauthorized person, fixing the amount of the attorney's compensation, unless it is also shown that he had knowledge thereof.<sup>4</sup>

### § 518. Acceptance of Benefits of Attorney's Services. —

It is well settled that when an attorney renders professional services for another with his consent, or the latter stands by and sees the attorney performing such services for him, which are beneficial in their nature, overlooks them as they progress, and does not interfere to prevent or forbid their performance, but appropriates the benefits thereof to himself, and there is no express employment, the law, in the interest of justice and right, will imply a promise, contemporaneous with the rendering of the services, on the part of the person for whose benefit they are rendered, to pay a reasonable compensation therefor.<sup>5</sup> What is a reasonable fee in

<sup>3</sup> *Saxton v. Harrington*, 52 Neb. 300, 72 N. W. 272.

<sup>4</sup> *Abel v. Hansen*, 62 Wash. 492, 114 Pac. 182.

<sup>5</sup> *Alabama*.—*Davis v. Walker*, 131 Ala. 204, 31 So. 554.

*California*.—*Kelly v. Ning Yung Benev. Assoc.*, 2 Cal. App. 460, 84 Pac. 321.

*Georgia*.—*Hood v. Ware*, 34 Ga. 328; *Cloud v. Taliaferro County*, 138 Ga. 214, 74 S. E. 1074.

*Illinois*.—*Cooper v. Delavan*, 61 Ill. 96; *Siegel v. Hanchett*, 33 Ill. App. 634.

*Indiana*.—*Miles v. De Wolf*, 8 Ind. App. 176, 34 N. E. 114; *Moore v. Orr*, 10 Ind. App. 89, 37 N. E. 554.

*Iowa*.—*Turner v. Myers*, 23 Ia. 391; *McCrary v. Ruddick*, 33 Ia. 521; *Hudspeth v. Yetzer*, 78 Ia. 11, 42 N. W. 529; *Door v. Dudley*, 135 Ia. 20, 112 N. W. 203.

*Kentucky*.—*Pittsburgh, etc., R. Co. v. Woolley*, 12 Bush 451; *Cincinnati Sav. Bank v. Benton*, 2 Met. 240; *Rarrick v. Clay*, 6 Ky. L. Rep. 360.

*Maryland*.—*Neighbors v. Maulsby*, 41 Md. 478; *Davis v. Gemmell*, 73 Md. 530, 21 Atl. 712.

*Michigan*.—*Lindner v. Hine*, 84 Mich. 511, 48 N. W. 43; *Fraser v. Haggerty*, 86 Mich. 521, 49 N. W. 616.

*Missouri*.—*Boyd v. Chicago & A. R. Co.*, 84 Mo. 615; *Trimble v. Texarkana & Ft. S. R. Co.*, 199 Mo. 44, 97 S. W. 164; *Trimble v. Guardian Trust Co.*, 244 Mo. 228, 148 S. W. 934.

*Nevada*.—*Mitchell v. Bromberger*, 1 Nev. 604.

*New Hampshire*.—*Goodall v. Bedel*, 20 N. H. 205.

*New York*.—*Clute v. Robison*, 38 Hun 283; *Fore v. Chandler*, 34 Misc. 786, 69 N. Y. S. 849; *Bogardus v. Livingston*, 7 Abb. Pr. 428; *Burghart v. Gardner*, 3 Barb. 64; *Wright v. Smith*,

such cases has been considered heretofore;<sup>6</sup> the client need not, however, pay the amount, or in the manner, prescribed by a contract under which the attorney was retained by other interested persons, in the absence of evidence that he sanctioned such contract.<sup>7</sup> Where the services are performed under a contract with the person against whom the suit for compensation has been brought, the acceptance of beneficial services is immaterial;<sup>8</sup> but where several persons are interested, the attorney may look for payment not only to the person who employed him, but also to the person actually benefited.<sup>9</sup>

### § 519. Sufficiency of Acceptance of Beneficial Services. —

It is equally well settled, however, that one person cannot make another his debtor without his consent, either express or implied; and, therefore, the mere fact that professional services inure to the benefit of one who did not contract for them, or consent to their rendition in his behalf, or lead counsel to believe by any word or act that he would pay for them, will not create a liability on his part for the attorney's compensation.<sup>10</sup> This is particularly true where the facts and circumstances presented not only repel

13 Barb. 414; *Hotchkiss v. Le Roy*, 9 Johns. 142; *Ward v. Lee*, 13 Wend 41.

*Ohio*.—*Holmes v. Holland*, 11 Ohio Dec. (Reprint) 768, 29 Cine. L. Bul. 115.

*Rhode Island*.—*Ames v. Potter*, 7 R. I. 265.

*Tennessee*.—*Yerger v. Aiken*, 7 Baxt. 539; *Hill v. Childress*, 10 Yerg. 515.

*Texas*.—*Fore v. Chandler*, 24 Tex. 146; *Ector v. Wiggins*, 30 Tex. 55; *International & G. N. R. Co. v. Clark*, 81 Tex. 48, 16 S. W. 631.

*Washington*.—*McKay v. Atkinson*, 55 Wash. 591, 104 Pac. 806.

*Wisconsin*.—*Felker v. Haight*, 33 Wis. 259.

<sup>6</sup> See *supra*, §§ 447-449.

<sup>7</sup> *Abel v. Hansen*, 62 Wash. 492, 114 Pac. 182.

<sup>8</sup> *Simmons v. Davenport*, 140 N. C. 407, 53 S. E. 225.

<sup>9</sup> *Kellogg v. Reese*, 14 Civ. Proc. 283, 1 N. Y. S. 291.

<sup>10</sup> *Alabama*.—*Humes v. Decatur Land Improvement & Furnace Co.*, 98 Ala. 461, 13 So. 368.

*Georgia*.—*Simms v. Floyd*, 65 Ga. 719.

*Illinois*.—*Chicago, St. C. & M. R. Co. v. Larned*, 26 Ill. 220.

*Indiana*.—*Hersleb v. Moss*, 28 Ind. 354; *Miles v. De Wolf*, 8 Ind. App. 153, 34 N. E. 114; *Cleveland, C. C. & St. L. R. Co. v. Shrum*, 24 Ind. App. 96, 55 N. E. 515.

*Kansas*.—*Muscott v. Stubbs*, 24 Kan. 520.

*Kentucky*.—*Patterson v. Fleenor*, 89 S. W. 705.

the idea of an implied promise to pay for the services, but, on the contrary, are entirely consistent with the absence of such a promise.<sup>11</sup> Thus, where each of several joint litigants has employed counsel in his own behalf, the fact that one of them assumed to act for the others, without authority, will not warrant the recovery of compensation by his attorney from those who did not engage his services, even though such services were, in fact, beneficial to all of them.<sup>12</sup> Nor will a party for whom an attorney acts without authority, be responsible for the attorney's compensation where it appears that his services were rendered upon the credit of another person,<sup>13</sup> or where the attorney was informed that such services would not be paid for.<sup>14</sup> Nor does the presence of a prosecutor, while an attorney was engaged in rendering professional services on the part of the government in a criminal proceeding, raise a presumption that the prosecutor promised to pay for such services.<sup>15</sup> So, the fact that the president of a village knew that attorneys, employed by the village to defend an action, were preparing to take an appeal, will not amount to an assent thereto by the village, so as to render it liable for the attorneys' services in connection with the prosecution of such appeal.<sup>16</sup> In some jurisdictions the rule that one will be liable for the services of counsel, the benefits of which he has accepted, does not prevail.<sup>17</sup>

*Minnesota*.—*White v. Esch*, 78 Minn. 264, 80 N. W. 976.

*Missouri*.—*Trimble v. Kansas City, Shreveport & G. R. Co.*, 201 Mo. 372, 100 S. W. 7.

*New York*.—*Burghart v. Gardner*, 3 Barb. 64; *Hotchkiss v. Le Roy*, 9 Johns. 142.

*Ohio*.—*Holmes v. Holland*, 11 Ohio Dec. (Reprint) 768, 29 Cinc. L. Bul. 115.

*Pennsylvania*.—*Jones v. Woods*, 76 Pa. St. 410.

*South Carolina*.—*Westmorland v. Martin*, 21 S. C. 238.

<sup>11</sup> *Holmes v. Holland*, 11 Ohio Dec. (Reprint) 768, 29 Cinc. L. Bul. 115.

<sup>12</sup> See *supra*, § 513.

<sup>13</sup> *Smith v. Lyford*, 24 Me. 147.

<sup>14</sup> *Holmes v. Holland*, 11 Ohio Dec. (Reprint) 768, 29 Cinc. L. Bul. 115.

<sup>15</sup> *Millett v. Hayford*, 1 Wis. 401.

<sup>16</sup> *Hooker v. Brandon*, 75 Wis. 8, 43 N. W. 741.

<sup>17</sup> *Louisiana*.—*Roselius v. Delachaise*, 5 La. Ann. 481, 52 Am. Dec. 597; *Cooley v. Cecile*, 8 La. Ann. 51; *Wailes v. Succession of Brown*, 27 La. Ann. 411; *Forman v. Sewerage & Water Board*, 119 La. 49, 12 Am. Cas. 773, 43 So. 908; *Dreifus v. Colonial Bank & Trust Co.*, 127 La. 1086, 54 So. 358; *In re McPherson's Estate*, 129 La. 182, 55 So. 756.



§ 520. **Employment by One Spouse as Binding the Other Generally.** — As a general rule, the employment of an attorney by the husband will not, in the absence of an express or implied authority so to do, create a liability on the part of the wife for the attorney's compensation.<sup>18</sup> Nor, under like circumstances, will the husband be liable for the fees of counsel retained by the wife,<sup>19</sup> excepting where such services are deemed to be necessary for the wife's maintenance or protection.<sup>20</sup> There is, necessarily perhaps, some conflict of opinion as to when legal advice becomes such a necessity as to make the husband responsible.<sup>1</sup> It has been held that a husband will be liable for the compensation of counsel engaged by the wife in an action, either legal or equitable, against him, where it appears that she was forced to leave her home because of ill-treatment,<sup>2</sup> or where she has been deserted by her husband.<sup>3</sup> So, wherever it is necessary for the safety of a wife to enter a complaint against her husband for a breach of the peace, he will be liable for the fees of counsel employed by her for that purpose.<sup>4</sup> And the husband has also been held to be responsible for the compensation of an attorney employed by the wife to defend her in a criminal prosecution, whether it was instituted by himself,<sup>5</sup> or by some third person;<sup>6</sup> and, *a fortiori*, the husband will be liable for the cost of defending his wife where the offense charged was committed with his knowledge and consent.<sup>7</sup> But the husband is not liable for an attorney's services rendered, at the instance of his wife, in criminal proceedings against himself, be-

<sup>18</sup> *Altkrug v. Horowitz*, 111 App. Div. 420, 97 N. Y. S. 716. See also *Whitesell v. New Jersey & H. R. R. & F. Co.*, 68 App. Div. 82, 74 N. Y. S. 217.

<sup>19</sup> *Plymat v. Brush*, 46 Minn. 23, 48 N. W. 443.

<sup>20</sup> *Grindell v. Godmond*, 5 Ad. & El. 755, 31 E. C. L. 431; *Sherwin v. Maiben*, 78 Ia. 467, 43 N. W. 292; *Smith v. Davis*, 45 N. H. 566.

<sup>1</sup> See the two sections following.

<sup>2</sup> *Williams v. Fowler*, 1 McClell. & Y. (Eng.) 269.

<sup>3</sup> *Wilson v. Ford*, L. R. 3 Exch. (Eng.) 63.

<sup>4</sup> *Shepherd v. Mackoul*, 3 Campb. (Eng.) 326; *Turner v. Rookes*, 10 Ad. & El. 47, 37 E. C. L. 35; *Williams v. Monroe*, 18 B. Mon. (Ky.) 514; *Morris v. Palmer*, 39 N. H. 123.

<sup>5</sup> *Conant v. Burnham*, 133 Mass. 503, 43 Am. Rep. 532; *Warner v. Heiden*, 28 Wis. 517, 9 Am. Rep. 515.

<sup>6</sup> *Artz v. Robertson*, 50 Ill. App. 27.

<sup>7</sup> *Shepherd v. Mackoul*, 3 Campb. (Eng.) 326.

cause, in such cases, the government, and not the wife, is the real prosecutor.<sup>8</sup>

§ 521. **In Actions for Divorce.**—The general rule in the United States is that a husband is not liable, in an independent action, for counsel fees incurred by his wife in the prosecution or defense of divorce proceedings,<sup>9</sup> or for counseling and advising her in reference to a suit for divorce.<sup>10</sup> Nor does the claim for compensation for professional services rendered to the wife in a divorce suit, derive any strength from the fact that the application for divorce was connected with a claim for the custody of minor children.<sup>11</sup> This rule has been predicated on two theories: the first being that the duty of providing necessities for the wife is strictly marital, and is imposed by the common law in reference only to a state of coverture, and not of divorce;<sup>12</sup> the second theory, however, rests upon the ground of ample power in the divorce court to make a proper allowance for counsel fees.<sup>13</sup> In some jurisdictions the rule has no application; thus, in Texas it is

<sup>8</sup> *Grindell v. Godmond*, 5 Ad. & El. 755, 31 E. C. L. 431; *Conant v. Burnham*, 133 Mass. 503, 43 Am. Rep. 532; *Smith v. Davis*, 45 N. H. 566; *McQuhae v. Rey*, 2 Misc. 476, 22 N. Y. S. 175, *affirmed* 3 Misc. 550, 23 N. Y. S. 16.

<sup>9</sup> *Indiana*.—*McCullough v. Robinson*, 2 Ind. 630.

*Kentucky*.—*Williams v. Monroe*, 18 B. Mon. 514.

*Massachusetts*.—*Coffin v. Dunham*, 8 Cush. 404, 54 Am. Dec. 769.

*Michigan*.—*Wolcott v. Patterson*, 100 Mich. 227, 58 N. W. 1006, 43 Am. St. Rep. 456, 24 L.R.A. 629.

*Missouri*.—*Musick v. Dodson*, 76 Mo. 624, 43 Am. Rep. 780; *Hamilton v. Salisbury*, 133 Mo. App. 718, 114 S. W. 563.

*New Hampshire*.—*Morrison v. Holt*, 42 N. H. 180, 80 Am. Dec. 120.

*New York*.—*Phillips v. Simmons*, 20 How. Pr. 342, 11 Abb. Pr. 287.

*Ohio*.—*Dorsey v. Goodenow*, Wright 120; *Sherer v. Price*, 2 Ohio Cir. Dec. 61, 3 Ohio Cir. Ct. 107.

*Tennessee*.—*Thompson v. Thompson*, 3 Head 527.

<sup>10</sup> *Kincheloe v. Merriman*, 54 Ark. 557, 16 S. W. 578, 26 Am. St. Rep. 60.

<sup>11</sup> *Shelton v. Pendleton*, 18 Conn. 417.

<sup>12</sup> *Alabama*.—*Pearson v. Darrington*, 32 Ala. 227.

*Connecticut*.—*Shelton v. Pendleton*, 18 Conn. 417; *Cooke v. Newell*, 40 Conn. 596.

*Illinois*.—*Dow v. Eyster*, 79 Ill. 254.

*New Hampshire*.—*Morrison v. Holt*, 42 N. H. 478, 80 Am. Dec. 120.

*Vermont*.—*Wing v. Hurlburt*, 15 Vt. 607, 40 Am. Dec. 695.

<sup>13</sup> *Georgia*.—*Glenn v. Hill*, 50 Ga. 94, *distinguishing* *Sprayberry v. Merk*, 30 Ga. 81, 76 Am. Dec. 637.

*Kentucky*.—*Williams v. Monroe*, 18

well settled that counsel for the wife in a divorce proceeding can recover, in an independent action against the husband, a reasonable fee for his services in the divorce suit, where there was reasonable cause for bringing the suit, and it was brought in good faith.<sup>14</sup> A similar rule prevails in Maryland<sup>15</sup> and in Iowa, pro-

B. Mon. 514, *distinguishing* *Billing v. Pilcher*, 7 B. Mon. 458, 46 Am. Dec. 523.

*Missouri*.—*Isbell v. Weiss*, 60 Mo. App. 54.

*Nebraska*.—*Burnham v. Tizard*, 31 Neb. 781, 48 N. W. 823; *Yeiser v. Lowe*, 50 Neb. 310, 69 N. W. 847.

*New Hampshire*.—*Ray v. Adden*, 50 N. H. 82, 9 Am. Rep. 175.

*New Jersey*.—*Westcott v. Hinckley*, 56 N. J. L. 343, 29 Atl. 154.

*Ohio*.—*Dorsey v. Goodenow*, *Wright* 120.

*Pennsylvania*.—*Graves v. Cole*, 19 Pa. St. 171.

*South Dakota*.—*Sears v. Swenson*, 22 S. D. 74, 115 N. W. 519.

*Washington*.—*Zent v. Sullivan*, 47 Wash. 315, 15 Ann. Cas. 19, 91 Pac. 1088, 13 L.R.A.(N.S.) 244.

*Wisconsin*.—*Clarke v. Burke*, 65 Wis. 359, 27 N. W. 22, 56 Am. Rep. 631.

Where the parties have been reconciled, whether the court, even in a divorce action, will allow the wife's counsel an allowance for his services in a divorce action begun by her, depends entirely on the local statute law. In some jurisdictions such allowances may be made. *Davis v. Davis*, 141 Ind. 367, 40 N. E. 803; *Courtney v. Courtney*, 4 Ind. App. 221, 30 N. E. 914; *Powell v. Lilly*, 68 S. W. 123, 24 Ky. L. Rep. 193; *McMakin v. Wickliffe*, 16 Ky. L. Rep. 240; *Beaulien v. Beaulien*, 114 Minn. 511, 131 N. W. 481; *Fullhart v. Fullhart*, 109 Mo. App. 705, 83 S. W. 541.

In other jurisdictions it has been held that where the parties to an action for divorce have become reconciled, and request a dismissal of the suit, the court has no power thereafter to grant an order for the payment of the wife's counsel fees. *Reynolds v. Reynolds*, 67 Cal. 176, 7 Pac. 480; *McNulloch v. Murphy*, 45 Ill. 256; *Kuntz v. Kuntz*, 80 N. J. Eq. 429, 83 Atl. 787; *Chase v. Chase*, 65 How. Pr. (N. Y.) 306.

And in *Bialy v. Bialy*, 167 Mich. 559, Ann. Cas. 1913A 800, 133 N. W. 496, it was said: "Our conclusion is that although counsel for the wife, who is complainant in a bill for divorce, may obtain an order for the payment of fees *pendente lite*, on making a proper case, yet if the controversy is settled by the parties by the voluntary return of the wife to the husband, and the abandonment of the suit, before counsel have procured such order, their right to it is gone. They should have procured the order while the suit was being prosecuted, and if they fail to do so their application will be too late."

<sup>14</sup> *Ceccato v. Deutschman*, 19 Tex. Civ. App. 434, 47 S. W. 739; *Bord v. Stubbs*, 22 Tex. Civ. App. 242, 54 S. W. 633; *Dodd v. Hein*, 26 Tex. Civ. App. 164, 62 S. W. 811; *Branch v. Kleenecke*, 3 Willson Civ. Cas. Ct. App. § 106; *McClelland v. McClelland*, 37 S. W. 350.

<sup>15</sup> *McCurley v. Stockbridge*, 62 Md. 422, 50 Am. Rep. 229.

viding, of course, that such services were necessary.<sup>16</sup> In England the wife's attorney may recover from the husband where she reasonably institutes a suit for a divorce, or a separation, on the ground of cruelty and adultery, or of cruelty alone.<sup>17</sup> And in other jurisdictions the husband is held to be liable, in an independent action, for the compensation of counsel engaged by the wife to defend an action for divorce brought by the husband.<sup>18</sup> But it seems to be conceded, even in those states, that where counsel services are unnecessary, or where the wife is able to pay for them, or where an allowance has been made for them, and, probably, where the wife is in the wrong, such an action cannot be maintained.<sup>19</sup> In West Virginia it has been held that the husband will be liable for counsel fees in divorce proceedings instituted by the wife on the ground of the husband's actual cruelty, but that no such liability exists where a divorce is sought for any other reason, even though it be statutory cruelty.<sup>20</sup> But in all jurisdictions the husband may, in such cases, bind himself by an agreement to pay the attorney employed by his wife, either a stipulated or a reasonable sum for his services in the suit; and such a claim is enforceable because it grows out of a moral as well as a legal obligation resting upon him. Moreover, such an agreement need not be in writing, for the reason that it recognizes the husband's obligation or liability, and assumes the payment of his own and not "another person's" debt or liability.<sup>1</sup>

<sup>16</sup> *Preston v. Johnson*, 65 Ia. 285, 21 N. W. 606; *Sherwin v. Mahen*, 78 Ia. 467, 43 N. W. 292; *Stockman v. Whitmore*, 140 Ia. 378, 118 N. W. 403; *Gordon v. Brackey*, 143 Ia. 102, 120 N. W. 83, 136 Am. St. Rep. 751, *practically overruling Johnson v. Williams*, 3 G. Greene 97, 54 Am. Dec. 491.

<sup>17</sup> *Ottaway v. Hamilton*, 3 C. P. D. 393; *Brown v. Ackroyd*, 5 El. & Bl. 819, 85 E. C. L. 819; *Stocken v. Patrick*, 29 L. T. N. S. 597. See also *Nairne v. Nairne*, 85 L. T. N. S. 619; *Rice v. Shepherd*, 12 C. B. N. S. 332,

104 E. C. L. 332; *Taylor v. Hailstone*, 52 L. J. Q. B. 101, 47 L. T. N. S. 440; *In re Hooper*, 2 De G. J. & S. 91, 33 L. J. Ch. 300; *Baylis v. Watkins*, 10 Jur. N. S. 114.

<sup>18</sup> *Porter v. Briggs*, 38 Ia. 166, 18 Am. Rep. 27; *Clyde v. Peavy*, 74 Ia. 47, 36 N. W. 883; *Gossett v. Patten*, 23 Kan. 341.

<sup>19</sup> *Sherwin v. Mahen*, 78 Ia. 467, 43 N. W. 292; *Gossett v. Patten*, 23 Kan. 341.

<sup>20</sup> *Peck v. Marling's Adm'r*, 22 W. Va. 708.

<sup>1</sup> *Stein v. Blake*, 56 Ill. App. 525.

§ 522. In Other Matrimonial Actions. — In the absence of statutory regulation, a husband's liability for the fees of counsel employed by his wife depends, as stated heretofore, on whether the services rendered can be classed as "necessaries." If so, the husband will be liable; if not, he will not be liable.<sup>2</sup> In most jurisdictions, however, matters of this character are governed by local statutes. Thus, it has been provided that the wife's attorney may recover compensation from the husband for services rendered in suits for alimony,<sup>3</sup> or for the restitution of conjugal rights,<sup>4</sup> or for support.<sup>5</sup> But a criminal prosecution against a husband for the nonsupport of his wife would not, in the absence of express statutory authority therefor, render him liable for the services of her counsel in conducting the prosecution.<sup>6</sup> So, under some statutes, the court may require the husband to pay such counsel fees as are necessary to enable the wife to carry on, or defend, an action for separation.<sup>7</sup> But, as a rule, such compensation must be

<sup>2</sup> See *supra*, § 520.

<sup>3</sup> *Kiddle v. Kiddle*, 90 Neb. 248, Ann. Cas. 1913A 796, 133 N. W. 181, 36 L.R.A.(N.S.) 1001; N. Y. Code Civ. Pro. § 1769.

*Under the Ontario statute* (Rev. St. Ont. c. 408, § 48), providing that "in no suit for alimony, in which the plaintiff fails to obtain a decree for alimony, shall any costs be decreed to be paid by the defendant beyond the amount of the cash disbursements properly made by the plaintiff's solicitor," it has been held that where, pending a suit for alimony, the plaintiff and defendant resume cohabitation, the plaintiff's solicitor is entitled only to an order for his cash disbursements, and is not entitled to full costs. *Ringrose v. Ringrose*, 10 Ont. Pr. 299, *affirmed* 10 Ont. Pr. 596, expressly *overruling* *Keith v. Keith*, 25 Grant Ch. (U. C.) 110, and in effect *overruling* *Leonard v. Leonard*, 9 Ont. Pr. 450, and *Moore v. Moore*, 10 Ont. Pr. 284.

<sup>4</sup> *Wilson v. Ford*, L. R. 3 Exch. (Eng.) 63.

<sup>5</sup> *Williams v. Monroe*, 18 B. Mon. (Ky.) 514.

<sup>6</sup> *McQuhae v. Rey*, 2 Misc. 476, 22 N. Y. S. 175, *affirmed* 3 Misc. 550, 23 N. Y. S. 16. And see also *supra*, § 520 note 8.

<sup>7</sup> *England*.—See the English cases cited in the preceding section at note 17.

*Nebraska*.—*Kiddle v. Kiddle*, 90 Neb. 248, Ann. Cas. 1913A 796, 133 N. W. 181, 36 L.R.A.(N.S.) 1001.

*New York*.—N. Y. Code Civ. Pro. 1769; *Naumer v. Gray*, 28 App. Div. 529, 51 N. Y. S. 222, *rehearing denied* 32 App. Div. 627, 53 N. Y. S. 1110; *Naumer v. Gray*, 41 App. Div. 361, 58 N. Y. S. 476; *Hays v. Ledman*, 28 Misc. 575, 59 N. Y. S. 687; *Wood v. Wood*, 30 Misc. 50, 62 N. Y. S. 854; *Langbein v. Schneider*, 27 Abb. N. Cas. 228, 16 N. Y. S. 943. See also *Damman v. Bancroft*, 43 Misc. 678, 88 N. Y. S. 386.

applied for during the pendency of the action or proceeding for separation; it cannot be recovered after a decree of absolute divorce between the parties has been entered,<sup>8</sup> nor, after the husband's death, can such a liability be enforced as against the representatives of his estate.<sup>9</sup>

### *Proof of Performance.*

§ 523. **Necessity of Proving Performance.**—An attorney who agrees with his client to perform specific services must, in order to warrant the recovery of compensation therefor, prove a performance of the contract on his part,<sup>10</sup> within a reasonable time

In *Ladd v. Lynn*, 2 M. & W. (Eng.) 265, it was said "that a deed of separation cannot be called necessary for the wife."

<sup>8</sup> *Hahn v. Rogers*, 34 Misc. 549, 69 N. Y. S. 926.

<sup>9</sup> *Kellogg v. Stoddard*, 89 App. Div. 137, 84 N. Y. S. 1015, reversing 40 Misc. 92, 81 N. Y. S. 275.

<sup>10</sup> *United States*.—*Baxter v. Billings*, 83 Fed. 790, 49 U. S. App. 767, 28 C. C. A. 85; *Lazarus v. McDonald*, 97 Fed. 121.

*Arkansas*.—*Pennington v. Underwood*, 56 Ark. 53, 19 S. W. 108.

*California*.—*Emeric v. Alvarado*, 90 Cal. 444, 27 Pac. 356; *Lavenson v. Wise*, 131 Cal. 369, 63 Pac. 622.

*Delaware*.—*Bayard v. McLane*, 3 Har. 139.

*District of Columbia*.—*Faguc v. Coreoran*, 3 Mackey 199; *Blankenship v. Cowling*, 31 App. Cas. 626.

*Georgia*.—*Swift v. Register*, 97 Ga. 446, 25 S. E. 315.

*Indiana*.—*Scobey v. Ross*, 5 Ind. 445; *McDowell v. Baker*, 29 Ind. 481.

*Kentucky*.—*Wilson v. Barnes*, 13 B. Mon. 330.

*Louisiana*.—In *re Labauve's Succession*, 34 La. Ann. 1191.

*Michigan*.—*Smedley v. Grand Haven*, 125 Mich. 424, 84 N. W. 626, 7 Detroit Leg. N. 586.

*Mississippi*.—*Holly Springs v. Manning*, 55 Miss. 380.

*Montana*.—*Harris v. Root*, 28 Mont. 159, 72 Pac. 429; *Foley v. Kleinschmidt*, 28 Mont. 198, 72 Pac. 432.

*New York*.—*Thorn v. Beard*, 135 N. Y. 643 mem., 32 N. E. 140; *Cole v. Roby*, 61 Hun 624 mem., 16 N. Y. S. 20; *Richards v. Washburn*, 28 App. Div. 109, 50 N. Y. S. 885, affirmed 163 N. Y. 585, 57 N. E. 1123; *Whitesell v. New Jersey & H. R. R. & F. Co.* 68 App. Div. 82, 74 N. Y. S. 217; *People v. New York Bldg.-Loan Banking Co.*, 112 App. Div. 167, 98 N. Y. S. 290; *Roake v. Palmer*, 119 App. Div. 64, 103 N. Y. S. 863; *Haire v. Hughes*, 127 App. Div. 530, 111 N. Y. S. 892, affirmed 197 N. Y. 514, 90 N. E. 1159; *Smidt v. Dessar*, 13 Misc. 254, 34 N. Y. S. 158, 68 N. Y. St. Rep. 205; *Bittner v. Gomprecht*, 28 Misc. 218, 29 Civ. Proc. 300, 58 N. Y. S. 1011; *Stow v. Hamlin*, 11 How. Pr. 452; *Myers v. Bachrach*, 110 N. Y. S. 872; *Mains v. Getchen*, 111 N. Y. S. 598.

*North Carolina*.—*Johnston v. Cutchin*, 133 N. C. 119, 45 S. E. 522.

and before the termination of the employment,<sup>11</sup> or show some sufficient excuse for nonperformance, as, for instance, the premature termination of his employment by the client,<sup>12</sup> or that performance was rendered impossible for some other reason.<sup>13</sup> The law will not presume, from mere proof of the undertaking, that the attorney has performed any valuable service under it.<sup>14</sup> The foregoing rule is frequently applied where cases are taken for a fee contingent on the successful outcome of litigation,<sup>15</sup> but it is equally applicable in all cases where performance by the attorney is a condition precedent to the right to compensation for his services. Thus, for instance, an attorney may be obliged to show that a claim was collected,<sup>16</sup> or a judgment obtained,<sup>17</sup> or an incumbrance removed,<sup>18</sup> if, under the terms of his agreement with his client, it was his duty so to do. It will be recalled, however, that the right to a retaining fee does not necessarily call for the performance of services, and, therefore, proof of performance in those cases consists merely of showing a readiness on the part of the attorney to do that for which he was engaged.<sup>19</sup>

**§ 524. Sufficiency of Proof.**—Performance on the part of the attorney is sufficiently established by proof showing that he

*Ohio.*—*Douglass v. Downend*, 30 Ohio Cir. Ct. Rep. 649.

*Tennessee.*—*Moyers v. Graham*, 15 Lea 57; *Vaughn v. Tealey*, 63 S. W. 236.

*Texas.*—*Shaw v. Threadgill*, 53 Tex. Civ. App. 254, 115 S. W. 671.

*Vermont.*—*Nichols v. Scott*, 12 Vt. 47; *Briggs v. Georgia*, 15 Vt. 61.

*Washington.*—*Rosenbaum v. Syver-son Lumber & Shingle Co.*, 65 Wash. 459, 118 Pac. 625.

*West Virginia.*—*Matheny v. Farley*, 66 W. Va. 680, 66 S. E. 1060.

<sup>11</sup> *Buchanan v. Tennant*, 60 Ore. 560, 120 Pac. 404.

<sup>12</sup> See *supra*, §§ 450–460.

<sup>13</sup> See *supra*, §§ 452, 454, 455.

<sup>14</sup> *Stow v. Hamlin*, 11 How. Pr. (N. Y.) 452. See also *Pickett v. Gore*, (Tenn.) 58 S. W. 402.

<sup>15</sup> See *supra*, § 423. See also *Eng-lish v. McConnell*, 23 Ill. 513; *Hargis v. Louisville Gas Co.*, 22 S. W. 85, 23 S. W. 790, 15 Ky. L. Rep. 369; *Allen v. Gregg*, (Pa.) 16 Atl. 46.

<sup>16</sup> *Bruce v. Baxter*, 7 Lea (Tenn.) 477.

<sup>17</sup> *Lockwood v. Brush*, 6 Dana (Ky.) 433; *Barnard v. Brower*, 110 N. Y. 77, 17 N. E. 376.

*Note for Fees in Hands of Innocent Transferee.*—A note given by a client to an attorney for services to be rendered in a suit is void, though in the hands of an innocent transferee, if the attorney fails to conduct the suit to judgment. *Weed v. Bond*, 21 Ga. 195.

<sup>18</sup> *Badger v. Gallaher*, 113 Ill. 662.

<sup>19</sup> See *supra*, § 406. See also *Pate v. Maples*, (Tenn.) 43 S. W. 740.

accomplished the purpose for which he was retained,<sup>20</sup> or that he performed all services required of him under his contract.<sup>1</sup> It is immaterial that he was called upon to do less work than the parties had contemplated when the agreement for compensation was entered into, or that the client's purpose was accomplished in a different way, and with less friction, than had been anticipated.<sup>2</sup> Nor is it essential to a recovery by the attorney that he should prove a literal performance; a substantial performance is sufficient. What would constitute a substantial performance, however, is a question which must be decided from the facts of each case.<sup>3</sup> For the purpose of showing performance, the attorney may introduce any competent evidence which will have a tendency to establish that fact,<sup>4</sup> the weight thereof being a question for the jury.<sup>5</sup> Thus, in some instances performance may be shown by the record,<sup>6</sup> or the pleadings,<sup>7</sup> or other writings.<sup>8</sup> So, depositions taken by the attorney during the progress of litigation may be introduced for the purpose of showing the performance of services, and also as bearing on the question of the care and skill with which they were performed.<sup>9</sup>

<sup>20</sup> *Indiana*.—Pennington *v.* Nave, 15 Ind. 323.

*Kentucky*.—Williams *v.* Thurston, 3 B. Mon. 164; Pittsburgh, C. & St. L. R. Co. *v.* Woolley, 12 Bush 451; Browder *v.* Long, 66 S. W. 600, 23 Ky. L. Rep. 2068; Hill *v.* Leland, 10 Ky. L. Rep. 280.

*Louisiana*.—State *v.* Barrow, Man. Unrep. Cas. 332.

*Michigan*.—Moran *v.* L'Etoile, 118 Mich. 159, 76 N. W. 370.

*New York*.—Sessions *v.* Palmeter, 75 Hun 268, 26 N. Y. S. 1076.

*South Carolina*.—Verner *v.* Sullivan, 26 S. C. 327, 2 S. E. 391.

<sup>1</sup> *Hidalgo County Drainage Dist. No. 1 v. Swearingen*, (Tex.) 58 S. W. 211.

<sup>2</sup> *Browder v. Long's Ex'r*, 66 S. W. 600, 23 Ky. L. Rep. 2068.

<sup>3</sup> *Craddock v. O'Brien*, 104 Cal. 217,

37 Pac. 896; *Hargis v. Louisville Gas Co.*, 22 S. W. 85, 23 S. W. 790, 15 Ky. L. Rep. 369; *Cole v. Richmond Min. Co.*, 18 Nev. 120, 1 Pac. 663; *Dennison v. Lawrence*, 44 App. Div. 287, 60 N. Y. S. 748, *reversing* 27 Misc. 99, 29 Civ. Proc. 176, 58 N. Y. S. 142, *appeal dismissed*, 162 N. Y. 649, 57 N. E. 1108; *Deering v. McCahill*, 51 Super. Ct. 263, *affirmed* 106 N. Y. 660, 13 N. E. 934.

<sup>4</sup> *Stewart v. Robinson*, 76 Cal. 164, 18 Pac. 157; *Wright v. Smith*, 13 Barb. (N. Y.) 414.

<sup>5</sup> See *infra*, § 565.

<sup>6</sup> See *supra*, § 502.

<sup>7</sup> *Harper v. Williamson*, 1 McCord L. (S. C.) 156.

<sup>8</sup> *Stewart v. Robinson*, 76 Cal. 164, 18 Pac. 157.

<sup>9</sup> *Stark v. Hill*, 31 Mo. App. 101.



§ 525. **Performance without Litigation.**—In proving performance it is not necessary to show that the attorney's services were actually rendered in court, or in the trial of a cause, even though, at the time of his employment, actual litigation and trial were contemplated; a performance may be just as effectively established by showing the accomplishment of the desired end without litigation or trial,<sup>10</sup> as, for instance, by a compromise or settlement.<sup>11</sup> Indeed it would seem, in many instances at least, that the avoidance of litigation might be deemed to be of benefit, rather than detrimental, to the client; nor is it uncommon to find contracts for compensation which provide for the possibility of settlement.<sup>12</sup> So, the rendition of professional services may be shown in connection with litigation to which the client was not a party.<sup>13</sup> Where a firm of attorneys was employed for a stipulated amount payable on the termination of the suit, and such suit was not brought, and no further demand was made on the firm for services, performance will be deemed to have been waived, and a recovery may be had on the contract.<sup>14</sup> But where parties covenant

<sup>10</sup> *United States*.—*Mellen v. U. S.*, 13 Ct. Cl. 71.

*Arkansas*.—*Cockrill v. Sanders*, 8 S. W. 831.

*Connecticut*.—*Richardson v. Rowland*, 40 Conn. 565.

*Indiana*.—*Cordes v. Bailey*, 39 Ind. App. 83, 78 N. E. 678, *rehearing denied*, 39 Ind. App. 84, 78 N. E. 1060.

*Kentucky*.—*Browder v. Long's Ex'r*, 66 S. W. 600, 23 Ky. L. Rep. 2068.

*Maryland*.—*Wheeler v. Harrison*, 94 Md. 147, 50 Atl. 523.

*New York*.—*In re Hynes*, 105 N. Y. 560, 12 N. E. 60; *Stoutenburgh v. Fleer*, 87 N. Y. S. 504.

Where the complete performance of an attorney's contract has been rendered unnecessary he may, nevertheless, recover reasonable compensation for services performed; thus, where it appears that an attorney was employed to procure an injunction, at L. Vol. II.—58.

tion, and his services, though failing in that respect, where of actual benefit to his client, it was held that, while he could not recover the sum stipulated in the contract, he should be allowed for the services rendered in behalf of his client and which were beneficial, a sum equivalent to the reasonable value thereof. *Hargis v. Louisville Gas Co.*, (Ky.) 23 S. W. 790.

<sup>11</sup> *Stoutenburgh v. Fleer*, 87 N. Y. S. 504; *McClain v. Williams*, 8 Verg. (Tenn.) 230; *Tabet v. Powell*, (Tex.) 78 S. W. 997.

<sup>12</sup> *Clifton v. Clark, Hood & Co.*, 84 Miss. 795, 37 So. 746. And see *supra*, § 459.

<sup>13</sup> *Dublin & S. W. R. Co. v. Akerman*, 2 Ga. App. 746, 59 S. E. 10.

<sup>14</sup> *Carter v. Baldwin*, 95 Cal. 475, 30 Pac. 595. And see also *supra*, §§ 439-446.

to pay the attorney a reasonable fee to defend them in a pending trial, and the case does not come to trial, the attorney can recover only nominal damages, unless special damages are alleged and proved, even though the attorney actually attended court for the purpose of making a defense.<sup>15</sup>

**§ 526. Performance by Associated Attorneys and Partners.** — Where two or more attorneys are associated in conducting litigation, or in the transaction of other legal business, performance by any one of them will be sufficient,<sup>16</sup> unless the contract of employment provides otherwise.<sup>17</sup> Of course, an agreement to the effect that the client is to have the joint services of several counsel retained by him would be binding, and, in that case, performance by all of them, jointly, must be proved, in order that a recovery may be had on the contract;<sup>18</sup> but, even in that case, any one of the attorneys so retained may recover reasonable compensation for his services, in the absence of express contractual provisions to the contrary.<sup>19</sup> So, where a law partnership has been retained, a performance by any member of the firm will ordinarily be sufficient to justify the recovery of compensation.<sup>20</sup> Matters pertaining to the compensation of law partnerships generally have been considered heretofore.<sup>1</sup>

**§ 527. Performance by Substitute.** — It has been stated heretofore that an attorney who has been engaged to render professional services cannot, without the consent of his client, delegate to another the authority so reposed in himself;<sup>2</sup> and, therefore, performance by a substitute is not sufficient to warrant a

<sup>15</sup> *Wilson v. Barnes*, 13 B. Mon. (Ky.) 330. And see also *supra*, §§ 447-449.

<sup>16</sup> *Phillips v. Edsall*, 127 Ill. 535, 20 N. E. 801; *Simon v. Brashear*, 9 Rob. (La.) 59, 41 Am. Dec. 321.

<sup>17</sup> *Morgan v. Roberts*, 38 Ill. 65.

<sup>18</sup> *Baxter v. Billings*, 83 Fed. 790, 19 U. S. App. 767, 28 C. C. A. 85; *Morgan v. Roberts*, 38 Ill. 65; *Pereifull v. Wilson*, 3 Ky. L. Rep. 759.

<sup>19</sup> *Pereifull v. Wilson*, 3 Ky. L. Rep. 759; *Wright v. Gillespie*, 43 Mo. App. 244.

<sup>20</sup> *Johnson v. Bright*, 15 Ill. 464; *Phillips v. South Park Com'rs*, 119 Ill. 626, 10 N. E. 230; *Eggleston v. Boardman*, 37 Mich. 14.

<sup>1</sup> See *supra*, §§ 471-474.

<sup>2</sup> See *supra*, § 210.

recovery, even though such substitute's qualifications are equal or superior to those of the counsel originally retained.<sup>3</sup> In some instances, however, it is conceded that this rule must yield to the necessities of the situation, as, for instance, where the original attorney is ill, or has been elevated to the bench.<sup>4</sup> In such cases, if the client is dissatisfied, it is his duty to tender compensation for the services already rendered, and rescind the contract of employment;<sup>5</sup> and if he fails to do so, and stands by and permits the work to be done by the substituted attorney, it may fairly be assumed that he assents thereto.<sup>6</sup> So, under the retainer of an attorney, or of a firm of attorneys, much of the business undertaken may be done by them or any one in their employ and under their direction, and it will be found extremely difficult to draw the line and say just what must be performed by the person or firm retained, and what may be done under their direction by persons in their employ.<sup>7</sup>

### § 528. Purpose Accomplished without Attorney's Aid. —

Where an attorney has been retained to conduct litigation, or to transact any other legal business, he cannot be deprived of the right to compensation for his services merely because his client, without the attorney's direct aid, brought the matter to a satisfactory conclusion;<sup>8</sup> but such a disposition of the business may affect the amount of the attorney's compensation, especially where no fixed sum has been agreed upon.<sup>9</sup> The rule is different, however, where the attorney's compensation depends on the successful outcome of the business undertaken. In such cases the attorney, if he fails, will not be entitled to claim compensation merely because the client subsequently succeeded by his own efforts,<sup>10</sup> or in any other way.<sup>11</sup> Of course, where the conduct of the client is such as

<sup>3</sup> *Morgan v. Roberts*, 38 Ill. 65.

<sup>4</sup> *Fenno v. English*, 22 Ark. 170;

*Rusc v. Larue*, 4 Litt. (Ky.) 411, 14 Am. Dec. 172. And see *supra*, § 452, as to "impossibility of performance" generally.

<sup>5</sup> *Fenno v. English*, 22 Ark. 170.

<sup>6</sup> *Eggleston v. Boardman*, 37 Mich. 14; *Allcorn v. Butler*, 9 Tex. 56; *Smith v. Lipscomb*, 13 Tex. 532.

<sup>7</sup> *Eggleston v. Boardman*, 37 Mich. 14.

<sup>8</sup> *Pierce v. Parker*, 121 Mass. 403.

<sup>9</sup> See *supra*, 456-458.

<sup>10</sup> *Simrall v. Morton*, 6 Ky. L. Rep. 735; *Hitchings v. Van Brunt*, 5 Abb. Pr. N. S. (N. Y.) 272. And see also *supra*, §§ 423, 457.

<sup>11</sup> *Fague v. Corcoran*, 3 Mackey (D. C.) 199.

to prevent performance, the attorney may, as a general rule, recover.<sup>12</sup> So, in some instances, the effect which a settlement by the client will have on the right of the attorney to be paid for his services, and the amount of such payment, is provided for in the contract for compensation.<sup>13</sup>

*Proof of Value of Services.*

§ 529. **In General.** — An attorney who sues for compensation must prove the value of his services.<sup>14</sup> A mere ledger entry, appearing under the title pertaining to the client's matter, is not sufficient.<sup>15</sup> It is not necessary, however, to prove the value of each step taken in a lawsuit;<sup>16</sup> it is enough to prove, in general terms, the proceedings in the cause, the time occupied in the performance of the services, and their value as a whole, or in detail, as the plaintiff may elect.<sup>17</sup> Thus where an attorney rendered a bill for legal services in perfecting the title to certain property, and conducting correspondence with reference thereto, he was not obliged to specify the charge for each item of service rendered, but was only required to state the value of each service performed so far as he was able.<sup>18</sup> So, in an action by a law firm to recover for its services, one of the partners will not be obliged, on cross-examination, to state the reasonable value of his individual services where they are so intermingled with those of his copartners as to be difficult of separation.<sup>19</sup> The plaintiff is not only a competent witness in his own behalf,<sup>20</sup> but his evidence may, of itself, be sufficient to establish his cause of action.<sup>1</sup> As an aid in deter-

<sup>12</sup> See *supra*, §§ 450, 451, 456-458.

<sup>13</sup> See *supra*, § 459.

<sup>14</sup> *Bell v. Welch*, 38 Ark. 139; *Fry v. Lofton*, 45 Ga. 171; *Stow v. Hamlin*, 11 How. Pr. (N. Y.) 452; *Garr v. Mairet*, 1 Hilt. (N. Y.) 498.

As to rules of evidence, see *supra*, §§ 501-506.

<sup>15</sup> *Davis v. Fischer*, 90 N. Y. S. 301. See also *Hale v. Ard*, 48 Pa. St. 22; *Briggs v. Georgia*, 15 Vt. 61.

<sup>16</sup> *Treacle v. Vaughan*, 83 Ark. 258, 103 S. W. 174; *Garfield v. Kirk*, 65 Barb. (N. Y.) 464.

<sup>17</sup> *Garfield v. Kirk*, 65 Barb. (N. Y.) 464.

<sup>18</sup> *Treacle v. Vaughan*, 83 Ark. 258, 103 S. W. 174.

<sup>19</sup> *Thorp v. Ramsey*, 51 Wash. 530, 99 Pac. 584.

<sup>20</sup> *Schlicht v. Stivers*, 61 Ia. 746, 16 N. W. 74; *Chamberlain v. Rodgers*, 79 Mich. 219, 44 N. W. 598; *Foster v. Newbrough*, 66 Barb. (N. Y.) 645.

<sup>1</sup> *Chamberlain v. Rodgers*, 79 Mich. 219, 44 N. W. 598; *West v. Eley*, 39 Ore. 461, 65 Pac. 798.

mining what may, or may not, be shown as evidence of the value of an attorney's services, it is advisable to consult the discussion, in the preceding chapter, as to the amount of compensation to which an attorney is entitled.<sup>2</sup> A conflict of evidence as to the value of an attorney's services presents a question of fact.<sup>3</sup>

**§ 530. Value of Retaining Fee.** — Where suit is brought for a retaining fee, the value thereof, in the absence of an express agreement in this respect, must be shown.<sup>4</sup> When the suit is brought for services generally, reasonable compensation therefor, as a rule, includes a retaining fee; where, however, a retaining fee is the only claim sued for, no actual services having been performed, its value, in the absence of an express agreement, must be what will compensate the plaintiff for entering into the service of the defendant,<sup>5</sup> and must, necessarily, depend on the evidence of the plaintiff,<sup>6</sup> and such other lawyers as may be called by either side as expert witnesses.<sup>7</sup>

**§ 531. In Actions upon Express Contracts.** — An agreement fairly entered into between an attorney and his client as to the amount of compensation which the attorney is to receive for his services is binding on both parties,<sup>8</sup> providing, of course, that it is not tainted with illegality.<sup>9</sup> The contract must, however, be established;<sup>10</sup> but, when established, it is at least *prima facie* evidence of the amount to which the attorney is entitled.<sup>11</sup> It may

<sup>2</sup> See *supra*, §§ 439-486.

<sup>3</sup> *Blizzard v. Applegate*, 77 Ind. 516; *Atkinson v. Dailey*, 107 Ind. 117, 7 N. E. 902; *Gedney v. Ayers*, 111 Minn. 66, 126 N. W. 398; *Williams v. Philadelphia*, 208 Pa. St. 282, 57 Atl. 578.

<sup>4</sup> *Knight v. Russ*, 77 Cal. 410, 19 Pac. 698. See also *Carter v. Baldwin*, 95 Cal. 475, 30 Pac. 595; *Buckles v. Northeast Kansas Tel. Co.*, 79 Kan. 34, 99 Pac. 813.

<sup>5</sup> As to the right to retaining fees see *supra*, § 406.

<sup>6</sup> See *supra*, § 529 note.

<sup>7</sup> See *supra*, §§ 445-450.

<sup>8</sup> See *supra*, §§ 439-446.

<sup>9</sup> See *supra*, §§ 428-437. And see the section following.

<sup>10</sup> *Dudley v. Sanders Mfg. Co.*, 114 Fed. 981; *Randolph v. St. Joseph. S. & N. R. Co.*, 118 Mo. App. 460, 94 S. W. 309; *Dickerson v. Scheuer*, 56 Super. Ct. 605, 1 N. Y. S. 419; *Fulton v. Western Stove Mfg. Co.*, (Tex.) 45 S. W. 1035; *Boyd v. Boyce*, (Tex.) 53 S. W. 720.

<sup>11</sup> *Ottoby v. Keyes*, 91 Mo. App. 146; *St. John v. Bird*, 110 N. Y. S. 389.

be proved by any competent testimony,<sup>12</sup> or it may be admitted by the adverse party;<sup>13</sup> and, when proven, the contract itself may be offered in evidence.<sup>14</sup> But the terms of the contract cannot be affected by parol evidence by way of construction or otherwise.<sup>15</sup> In an action brought upon an express contract, evidence of the reasonable value of the attorney's services is inadmissible,<sup>16</sup> excepting, possibly, where the contract is attacked as unfair,<sup>17</sup> because, in the absence of unfairness or fraud, the mere fact that either the client or the attorney made a bad bargain, and that the services performed were reasonably worth more or less than the price agreed upon, cannot relieve either party from his contract.<sup>18</sup>

**§ 532. Burden of Proving Fairness.**—In an action for compensation based on an express contract, the attorney has the burden of proving that the contract was fairly and honestly entered into with the client, and that no advantage was taken of the client's ignorance either of the law, or of any facts within the knowledge of the attorney.<sup>19</sup> This is especially true as to contracts for compen-

<sup>12</sup> *Evidence of an agent*, through whom the attorney was employed, is admissible to show the terms of a contract as to the attorney's compensation. *Britt v. Burghart*, 16 Tex. Civ. App. 78, 41 S. W. 389. See also *Holmes v. Holland*, 11 Ohio Dec. (Reprint) 768, 29 Cine. L. Bul. 115.

<sup>13</sup> *Knight v. Whitmore*, 125 Cal. 198, 57 Pac. 891.

<sup>14</sup> *Schultheis v. Nash*, 27 Wash. 250, 67 Pac. 707.

<sup>15</sup> See *supra*, § 419. See also *Russell v. Young*, 94 Fed. 45, 36 C. C. A. 71; *Funk v. Mohr*, 185 Ill. 395, 57 N. E. 2, *affirming* 85 Ill. App. 97; *Gaither v. Dougherty*, 38 S. W. 2, 18 Ky. L. Rep. 709; *Fulton v. Western Stove Mfg. Co.*, (Tex.) 45 S. W. 1035; *Cain v. Moore*, 54 Wash. 627, 103 Pac. 1130.

<sup>16</sup> *Colorado*.—*Rockwell Stock & Land Co. v. Castroni*, 6 Colo. App. 528, 42 Pac. 180.

*District of Columbia*.—*Gilbert v. Fay*, 4 App. Cas. 38; *Heiberger v. Worthington*, 23 App. Cas. 565.

*Georgia*.—*Bull v. St. Johns*, 39 Ga. 78.

*Illinois*.—*People's Casualty Claim Adjustment Co. v. Darrow*, 172 Ill. 62, 49 N. E. 1005.

*New York*.—*Marston v. Baerenklan*, 11 Misc. 620, 32 N. Y. S. 785, *affirmed* 13 Misc. 13, 33 N. Y. S. 994.

*Pennsylvania*.—*Fitzpatrick v. Lincoln Savings & Trust Co.*, 194 Pa. St. 544, 45 Atl. 333; *Appeal of Wait*, 20 W. N. C. 19, 9 Atl. 943.

<sup>17</sup> *Caccia v. Isecke*, 123 App. Div. 779, 108 N. Y. S. 542. See also the section following.

<sup>18</sup> See *supra*, § 439. See also *Reynolds v. Sorosis Fruit Co.*, 133 Cal. 625, 66 Pac. 21.

<sup>19</sup> *Alabama*.—*Kidd v. Williams*, 132 Ala. 140, 31 So. 458, 56 L.R.A. 879.

sation entered into after the relation of attorney and client has been established; and, in some jurisdictions, the rule is confined to these contracts, those by which the relation is effected being deemed to have been made at arm's length. This subject has been considered heretofore.<sup>20</sup> It has been held, however, that an attorney is not obliged, in proving his case in chief, to assume the burden of proving that he has not induced his client to enter into the agreement, upon which suit is brought, by fraud, or an abuse of confidence,<sup>1</sup> unless, perhaps, the sum stipulated for in the contract is, of itself, so large as to warrant an inference, in the absence of explanation, that it is exorbitant.<sup>2</sup> So, where the only issue involved was whether a contract was in fact made, it was held that the court was justified in refusing to charge that the jury must be satisfied that the contract was a fair one, where there was no evidence that the contract was unfair, or that the attorney had overreached the client.<sup>3</sup> On an issue as to whether a contract for compensation is fair and conscionable, evidence of the value of the services rendered under it may be introduced.<sup>4</sup> In a suit to recover an attorney's fee which has been allowed in another action, there is a presumption that the fee allowed is fair and reasonable.<sup>5</sup> So, the introduction in evidence of a trust deed fixing the amount of an attorney's fee, has been held to be *prima facie* proof of its reasonableness.<sup>6</sup> Where an attorney testified

*Indiana*.—Shirk v. Neible, 156 Ind. 66, 59 N. E. 281, 83 Am. St. Rep. 150.

*Iowa*.—Donaldson v. Eaton, 136 Ia. 650, 114 N. W. 19, 125 Am. St. Rep. 275, 14 L.R.A. (N.S.) 1168.

*Maine*.—Burnham v. Heselton, 82 Me. 495, 20 Atl. 80, 9 L.R.A. 90, 84 Me. 578, 24 Atl. 955.

*New York*.—Randall v. Packard, 1 Misc. 344, 20 N. Y. S. 716, *affirmed* 142 N. Y. 47, 36 N. E. 823; Blaikie v. Post, 137 App. Div. 648, 122 N. Y. S. 292.

*Oregon*.—Hamilton v. Holmes, 48 Ore. 453, 87 Pac. 154.

<sup>20</sup> See *supra*, §§ 428-432.

As to dealings between attorney

and client generally, see *supra*, §§ 152-163.

<sup>1</sup> Beagles v. Robertson, 135 Mo. App. 306, 115 S. W. 1042.

<sup>2</sup> Beagles v. Robertson, 135 Mo. App. 306, 115 S. W. 1042; Weeks v. Gattell, 125 App. Div. 402, 109 N. Y. S. 977, *affirmed* 193 N. Y. 681 *mem.*, 87 N. E. 1129.

<sup>3</sup> Werner v. Knowlton, 107 App. Div. 158, 94 N. Y. S. 1054.

<sup>4</sup> Caccia v. Isecke, 123 App. Div. 779, 108 N. Y. S. 542.

<sup>5</sup> Ramage v. Littlejohn, 17 Wash. 386, 49 Pac. 486.

<sup>6</sup> Dorn v. Ross, 177 Ill. 225, 52 N. E. 321, *affirming* 77 Ill. App. 223.

that after two thirds of the work had been performed he refused to proceed further without a promise of more than the ordinary fee, because of certain compromising complications, cross-examination was allowed, as bearing on his credibility, as to what these complications were.<sup>7</sup> A conflict of evidence usually presents a question of fact for the jury.<sup>8</sup>

### § 533. In Actions on Implied Contracts Generally.—

Where an attorney at law renders professional services to a client, and there is no agreement as to the amount of his compensation, he is entitled to the reasonable value of his services.<sup>9</sup> The question of what is, or is not, reasonable compensation, at best one of considerable difficulty, has been considered heretofore, and should be consulted in this connection.<sup>10</sup> Precisely the same difficulty which is encountered in fixing the amount of compensation under an implied contract, also presents itself in the effort to introduce evidence of the reasonable value of the attorney's services. For certain services of a mechanical or routine character, and for certain formal proceedings or transactions, either the law has laid down, or custom has fixed, certain charges which are deemed a proper and fair compensation.<sup>11</sup> But for those services which are rendered by the intelligent and educated lawyer in the trial or argument of difficult cases, in the study and investigation of intricate and novel questions of law, calling for special intelligence, labor or ability, no regular tariff or measure of value can be fixed, not only because of the natural difference, as between lawyers, in ability and experience, or in aptitude for special branches of law,

<sup>7</sup> *Bolton v. Daily*, 48 Ia. 318.

<sup>8</sup> See *infra*, § 565.

<sup>9</sup> See *supra*, §§ 404, 437.

"The law assumes that the laborer is worthy of his hire, even though he be a lawyer." *Holmes v. Holland*, 11 Ohio Dec. (Reprint) 768, 29 Cine. L. Bul. 115.

In *New Jersey* fees for advocacy cannot be recovered in the absence of an express contract therefor. It is otherwise, however, as to services ren-

dered, even though by a counselor, in the capacity of attorney at law. See *supra*, § 405.

<sup>10</sup> See *supra*, §§ 447-449.

<sup>11</sup> *People v. Bond Street Sav. Bank*, 10 Abb. N. Cas. (N. Y.) 15.

A schedule of fees fixed by a bar association is not admissible in evidence on the question of reasonable compensation. *Gaither v. Dougherty*, 38 S. W. 2, 18 Ky. L. Rep. 709.



but also because so much depends upon the peculiar characteristics or the relative importance of the special service under consideration.<sup>12</sup> Indeed, it is evident that reasonable value depends entirely on the facts presented in the individual case. It is competent, therefore, to introduce evidence of every circumstance attending the cause which, according to established usage, will serve to guide to a conclusion as to what is a proper professional charge.<sup>13</sup> Thus, as bearing on the value of an attorney's services, it is competent to introduce evidence as to his ability, skill, experience, diligence, and his standing in his profession. It is also competent to prove the nature and extent of the services performed; the difficulties encountered; the responsibility assumed; the physical and mental labor involved; the importance of the litigation; the amount in controversy; the result achieved, and its benefits; and, in some states, the client's wealth may be shown, and, possibly, his lack of wealth; and the usual and customary charges for like services in the same vicinity.<sup>14</sup> On the other hand, it should be remembered that the profession of the law is not one that is pursued for money only. Its professors should, and generally do, remember that they form a class of the community who are in some de-

<sup>12</sup> *People v. Bond Street Sav. Bank*, 10 Abb. N. Cas. (N. Y.) 15; *Heblich v. Slater*, 217 Pa. St. 404, 66 Atl. 655.

<sup>13</sup> *Georgia*.—*Spicer v. Yopp*, 30 Ga. 285; *Dublin & S. W. R. Co. v. Akerman*, 2 Ga. App. 746, 59 S. E. 10; *Coker v. Oliver*, 4 Ga. App. 728, 62 S. E. 483.

*Kentucky*.—*Bryant v. Maxwell*, 12 S. W. 1134, 11 Ky. L. Rep. 225; *Whallen v. Hallam*, 76 S. W. 860, 25 Ky. L. Rep. 965.

*Louisiana*.—*Hunt v. Orleans Cotton Press Co.*, 2 Rob. 404; *Durand v. Landry*, 120 La. 513, 45 So. 409.

*Michigan*.—*Eggleston v. Boardman*, 37 Mich. 14; *Myers v. Radford*, 167 Mich. 135, 132 N. W. 550.

*Minnesota*.—*Lind v. Jones*, 104 Minn. 302, 116 N. W. 579; *Dwyer v.*

*Hurley*, 109 Minn. 415, 124 N. W. 4. *Mississippi*.—*Holly Springs v. Manning*, 55 Miss. 380.

*Montana*.—*McHatton v. Girard*, 41 Mont. 387, 109 Pac. 704.

*New York*.—*Smith v. Hayes*, 10 App. Div. 245, 41 N. Y. S. 954, 75 N. Y. St. Rep. 1328.

*Ohio*.—*Holmes v. Holland*, 11 Ohio Dec. (Reprint) 768, 29 Cine. L. Bul. 115.

*Pennsylvania*.—*Heblich v. Slater*, 217 Pa. St. 404, 66 Atl. 655.

*Texas*.—*Aycock v. Baker*, 60 S. W. 273; *Cahill v. Dickson*, 77 S. W. 281.

*Vermont*.—*Carpenter v. Gibson*, 82 Vt. 336, 73 Atl. 1030.

*Washington*.—*Ramage v. Littlejohn*, 17 Wash. 386, 49 Pac. 486.

<sup>14</sup> See the sections following in this subdivision.

gree compensated for their labor, and the time spent in anxious search after knowledge, by the respect and regard entertained for them generally, and by the opportunities, so often afforded, of impressing on the age in which they live the spirit and genius which animate them.<sup>15</sup> The general rule, that the measure of damages in case of an employer's breach of a contract for personal employment is the difference between what the employee received or might have received from others and the price agreed on, does not generally apply to breach of a contract for attorney's services, but may apply under peculiar circumstances.<sup>16</sup>

### § 534. Attorney's Ability, Experience and Standing.—

While it is true that in the rendition of legal services any competent lawyer may, in many instances, serve as well as another,<sup>17</sup> it is equally true that lawyers are often called upon, in the conduct of litigation and otherwise, to perform professional services which require the exercise of keen judgment and delicate perception, as well as a sound and extensive knowledge of the law, and that, in so doing, there may be no comparison between the relative abilities of two men.<sup>18</sup> Therefore, it is competent, in actions for compensation, to show the ability, skill, experience, and standing of the plaintiff as a lawyer.<sup>19</sup> So, where the possession of particular qualifications constitute an important element in the value of the services rendered, evidence thereof may be admitted, and is en-

<sup>15</sup> *Hunt v. Orleans Cotton Press Co.*, 2 Rob. (La.) 404.

<sup>16</sup> *Kikuchi v. Ritchie*, 202 Fed. 857, 121 C. C. A. 215.

<sup>17</sup> *Playford v. Hutchinson*, 135 Pa. St. 426, 19 Atl. 1019; *Heblich v. Slater*, 217 Pa. St. 404, 66 Atl. 655.

<sup>18</sup> *Heblich v. Slater*, 217 Pa. St. 404, 66 Atl. 655. See also *Phelps v. Hunt*, 40 Conn. 97; *People v. Bond Street Sav. Bank*, 10 Abb. N. Cas. (N. Y.) 15.

<sup>19</sup> *Colorado*.—*Willard v. Williams*, 10 Colo. App. 110, 50 Pac. 207.

*Connecticut*.—*Phelps v. Hunt*, 40 Conn. 97.

*Illinois*.—*Levinson v. Sands*, 74 Ill. App. 273.

*Iowa*.—*Clark v. Ellsworth*, 104 Ia. 442, 73 N. W. 1023.

*Michigan*.—*Eggleston v. Boardman*, 37 Mich. 14; *Lungerhausen v. Crittenden*, 103 Mich. 173, 61 N. W. 270.

*Ohio*.—*Kittredge v. Armstrong*, 11 Ohio Dec. (Reprint) 661, 28 Cine. L. Bul. 249; *Holmes v. Holland*, 11 Ohio Dec. (Reprint) 768, 29 Cine. L. Bul. 115.

*Tennessee*.—*Bowling v. Scales*, 1 Tenn. Ch. 618.

*Vermont*.—*Vilas v. Downer*, 21 Vt. 419.

titled to much consideration.<sup>20</sup> The services of a lawyer who, in order to excel in his profession, has devoted years to preliminary studies, and has spent much labor and money thoroughly to fit him for his calling, so that he might be able to act as an advocate in court, or as a counselor to guide and direct others, to furnish them from his vast storehouse of knowledge, ripened and perfected from long experience, with ideas and suggestions which, when carried out, would lead to success, is not, of course, to be compared with ordinary labor.<sup>1</sup> Thus, the artist who transfers to the canvas the living likeness, destined perhaps to become immortal as a work of art, is entitled to a vastly higher compensation than he would be for spending the same time in painting buildings. So the recompense to be paid the sculptor who conceives, moulds, and produces his masterpieces of form, cannot be measured and fixed by a standard based alone upon the time he spent in their production; nor in cases where they were merely executed under his direction, could his reward be fixed upon the same standard as of those who performed the manual labor under his personal supervision. The productions of the composer, the poet, and the author, cannot be valued by the time apparently spent in their preparation, because they are formed of a combination of ideas which may have cost their authors years of application to complete.<sup>2</sup> In order, however, that an attorney's ability and professional standing may be taken into consideration by the jury, there must be some evidence thereof on the record.<sup>3</sup> Facts of this character are usually established by the testimony of members of the bar.<sup>4</sup> It has been held, however, that the amount of business which an attorney transacts may also be shown as evidence of his professional standing.<sup>5</sup>

§ 535. **Nature and Extent of Services.** — It is customary and permissible, in actions for compensation, to introduce evi-

<sup>20</sup> *Phelps v. Hunt*, 40 Conn. 97.

<sup>4</sup> See *infra*, § 546.

<sup>1</sup> *Eggleston v. Boardman*, 37 Mich. 14.

<sup>5</sup> *Phelps v. Hunt*, 40 Conn. 97. See also *Robbins v. Harvey*, 5 Conn. 335. Compare *Gaither v. Dougherty*, 38 S. W. 2, 18 Ky. L. Rep. 709.

<sup>2</sup> *Eggleston v. Boardman*, 37 Mich. 14.

<sup>3</sup> *Smith v. Couch*, 117 Mo. App. 267, 92 S. W. 1143.

dence as to the nature<sup>6</sup> and extent<sup>7</sup> of the services rendered, for the purpose of showing their value. Thus, the questions of law involved—their intricacy, difficulty, or novelty—may be shown.<sup>8</sup> It is also competent to prove the physical and mental labor involved.<sup>9</sup>

<sup>6</sup> *Alabama*.—*Davis v. Walker*, 131 Ala. 204, 31 So. 554.

*Indiana*.—*McFadden v. Ferris*, 6 Ind. App. 454, 32 N. E. 107.

*Iowa*.—*Stevens v. Ellsworth*, 95 Ia. 231, 63 N. W. 683; *Graham v. Dillon*, 144 Ia. 82, 121 N. W. 47.

*Kentucky*.—*Stucky v. Smith*, 148 Ky. 401, 146 S. W. 1128; *Trimble v. Acme Mills & Elevator Co.*, 151 Ky. 570, 152 S. W. 561.

*Louisiana*.—*Hunt v. Orleans Cotton Press Co.*, 2 Rob. 404; *Brewer v. Cook*, 11 La. Ann. 637; *Breaux v. Francke*, 30 La. Ann. 336.

*Michigan*.—*Eggleston v. Boardman*, 37 Mich. 14; *Babbitt v. Bumpus*, 73 Mich. 331, 41 N. W. 417, 16 Am. St. Rep. 585.

*New York*.—*Harland v. Lilienthal*, 53 N. Y. 438; *People v. Bond Street Sav. Bank*, 10 Abb. N. Cas. 15.

*Ohio*.—*Kittredge v. Armstrong*, 11 Ohio Dec. (Reprint) 661, 28 Cine. L. Bul. 249; *Holmes v. Holland*, 11 Ohio Dec. (Reprint) 768, 29 Cine. L. Bul. 115.

*Pennsylvania*.—*Heblieh v. Slater*, 217 Pa. St. 404, 66 Atl. 655.

*Vermont*.—*Vilas v. Downer*, 21 Vt. 419.

<sup>7</sup> *Iowa*.—*Graham v. Dillon*, 144 Ia. 82, 121 N. W. 47.

*Kentucky*.—*Stucky v. Smith*, 148 Ky. 401, 146 S. W. 1128.

*Louisiana*.—*Brewer v. Cook*, 11 La. Ann. 637.

*Maine*.—*Snow v. Gould*, 74 Me. 540, 13 Am. Rep. 604.

*Michigan*.—*Eggleston v. Boardman*, 37 Mich. 14.

*New York*.—*Shiel v. Muir*, 51 Hun 644 mem., 4 N. Y. S. 272.

*Ohio*.—*Holmes v. Holland*, 11 Ohio Dec. (Reprint) 768, 29 Cine. L. Bul. 115.

*Wisconsin*.—*Yates v. Shepardson*, 27 Wis. 238.

The fact that an attorney was obliged to make a special adjustment, not merely of his time and business, but of his office, to meet the demands made upon him by his client, has a legitimate bearing upon the amount of his compensation. *Cooper v. Harvey*, 77 Kan. 854, 94 Pac. 213.

<sup>8</sup> *Iowa*.—*Stevens v. Ellsworth*, 95 Ia. 231, 63 N. W. 683.

*Louisiana*.—*Hunt v. Orleans Cotton Press Co.*, 2 Rob. 404; *Breaux v. Francke*, 30 La. Ann. 336.

*New York*.—*People v. Bond Street Sav. Bank*, 10 Abb. N. Cas. 15.

*Ohio*.—*Kittredge v. Armstrong*, 11 Ohio Dec. (Reprint) 661, 28 Cine. L. Bul. 249.

<sup>9</sup> *Kentucky*.—*Nesbitt v. Whaley's Adm'r*, 10 Ky. L. Rep. 400 (abstract).

*Louisiana*.—*Hunt v. Orleans Cotton Press Co.*, 2 Rob. 404; *Dorsey v. His Creditors*, 5 Mart. N. S. 399; *Succession of Macarty*, 3 La. Ann. 517; *Breaux v. Francke*, 30 La. Ann. 336.

*Mississippi*.—*Holly Springs v. Manning*, 55 Miss. 380.

*New York*.—*People v. Bond Street Sav. Bank*, 10 Abb. N. Cas. 15.

*Ohio*.—*Holmes v. Holland*, 11 Ohio Dec. (Reprint) 768, 29 Cine. L. Bul. 115.

and the responsibilities assumed.<sup>10</sup> The fact that litigation continued through four years does not entitle the attorney to four years' compensation, if the services could have been performed in a less time had the condition of the dockets permitted the proceedings to be pressed as they otherwise would have been.<sup>11</sup>

**§ 536. Importance of Litigation.**—The importance of a cause to the client is worthy of consideration in determining the value of the attorney's services,<sup>12</sup> and evidence thereof may be introduced for that purpose.<sup>13</sup> It is on this principle that evidence of the amount in controversy is admissible.<sup>14</sup> So, where several suits are pending in the same court, and involve the same questions, and one attorney is employed to conduct all of them, and he succeeds in obtaining a stipulation that one of the cases shall be tried as a test case, and that the others shall abide by the result thereof, it is proper, in determining the compensation to which the attorney is entitled, to take into consideration the services rendered by him in the test case as bearing on the value of his services in each of the other cases.<sup>15</sup> An attorney may also show the nature and importance of criminal cases, wherein he has been

<sup>10</sup> *Louisiana*.—*Hunt v. Orleans Cotton Press Co.*, 2 Rob. 404; *Dorsey v. His Creditors*, 5 Mart. N. S. 399; *Succession of Macarty*, 3 La. Ann. 517.

*Mississippi*.—*Holly Springs v. Manning*, 55 Miss. 380.

*New York*.—*People v. Bond Street Sav. Bank*, 10 Abb. N. Cas. 15.

*Pennsylvania*.—*Heblich v. Slater*, 217 Pa. St. 404, 66 Atl. 655.

<sup>11</sup> *Stucky v. Smith*, 148 Ky. 401, 146 S. W. 1128.

<sup>12</sup> *Selover v. Bryant*, 54 Minn. 434, 56 N. W. 58, 40 Am. St. Rep. 349, 21 L.R.A. 418.

<sup>13</sup> *Iowa*.—*Clark v. Ellsworth*, 104 Ia. 442, 73 N. W. 1023.

*Kentucky*.—*Stucky v. Smith*, 148 Ky. 401, 146 S. W. 1128.

*Louisiana*.—*Breaux v. Franeke*, 30 La. Ann. 336.

*Mississippi*.—*Holly Springs v. Manning*, 55 Miss. 380.

*New York*.—*Harland v. Lilienthal*, 53 N. Y. 438.

*Ohio*.—*Kittredge v. Armstrong*, 11 Ohio Dec. (Reprint) 661, 28 Cinc. L. Bul. 249; *Holmes v. Holland*, 11 Ohio Dec. (Reprint) 768, 29 Cinc. L. Bul. 115.

*Pennsylvania*.—*Heblich v. Slater*, 217 Pa. St. 404, 66 Atl. 655.

*Texas*.—*International & G. N. R. Co. v. Clark*, 81 Tex. 48, 16 S. W. 631.

<sup>14</sup> See the section following.

<sup>15</sup> *Bruce v. Dickey*, 116 Ill. 527, 6 N. E. 435. See also *Harland v. Lilienthal*, 53 N. Y. 438.

retained, as bearing on the value of his services.<sup>16</sup> As opposed to this view, it was contended in one case that "one day's work in an important cause is worth no more than the same services in a suit of less magnitude; that as well might any laborer or mechanic charge extra wages per day when fortunate enough to secure a large job; that where work requires a different kind of skill or workmanship, then, of course, such charge should be made as the skill required would command, but the same skill and workmanship upon an important piece of work would bring no more per day than when it was applied to a lesser job; and that the same knowledge of practice and rules of law are required of the attorney or solicitor in one case as the other." The contention, however, was disapproved.<sup>17</sup>

**§ 537. Amount in Controversy.**—It is well settled that the amount in controversy, and the value of property involved in litigation, are legitimate subjects of proof in an action by an attorney against his client for compensation for his services.<sup>18</sup> Thus, in an action for legal services in preparing abstracts of title to land, on the faith of which a purchase of the land was made, the

<sup>16</sup> *Daly v. Hines*, 55 Ga. 470.

<sup>17</sup> *Eggleston v. Boardman*, 37 Mich.

14.

<sup>18</sup> *United States*.—*Lombard v. Bayard*, 1 Wall. Jr. 196, 15 Fed. Cas. No. 8,469; *Graves v. Sanders*, 125 Fed. 690, 60 C. C. A. 422; *Gilmore v. McBride*, 156 Fed. 464, 84 C. C. A. 274.

*California*.—*Cusick v. Boyne*, 1 Cal. App. 643, 82 Pac. 985.

*Illinois*.—*Haish v. Payson*, 107 Ill. 365; *Campbell v. Goddard*, 17 Ill. App. 385.

*Indiana*.—*McFadden v. Ferris*, 6 Ind. App. 454, 32 N. E. 107.

*Iowa*.—*Berry v. Davis*, 34 Ia. 594; *Smith v. Chicago & N. W. R. Co.*, 60 Ia. 515, 15 N. W. 291; *Clark v. Ellsworth*, 104 Ia. 442, 73 N. W. 1023.

*Kentucky*.—*Stucky v. Smith*, 148 Ky. 401, 146 S. W. 1128; *Trimble v.*

*Acme Mills & Elevator Co.*, 151 Ky. 570, 152 S. W. 561.

*Louisiana*.—*Hunt v. Orleans Cotton Press Co.*, 2 Rob. 404.

*Missouri*.—*Smith v. Couch*, 117 Mo. App. 267, 92 S. W. 1143; *Clay v. Brown*, 148 Mo. App. 541, 128 S. W. 803.

*New York*.—*People v. Bond Street Sav. Bank*, 10 Abb. N. Cas. 15; *Garfield v. Kirk*, 65 Barb. 464.

*Ohio*.—*Kittredge v. Armstrong*, 11 Ohio Dec. (Reprint) 661, 28 Cinc. L. Bul. 249.

*Tennessee*.—*Taylor v. Badoux*, 58 S. W. 919.

*Texas*.—*International & G. N. R. Co. v. Clark*, 81 Tex. 48, 16 S. W. 631.

*Washington*.—See *Cain v. Moore*, 54 Wash. 627, 103 Pac. 1130.

price received may be considered as a circumstance tending to show what would be a reasonable fee for the services rendered.<sup>19</sup> So, in estimating the value of an attorney's services in soliciting the pardon of a fugitive from justice in order to obtain him as a witness, the amount of the claim in the case in which he was to testify is proper for the consideration of the jury.<sup>20</sup> The amount involved in several suits, conducted by the same attorney for the same client, may also be considered.<sup>1</sup> Thus, in estimating the proper compensation of an attorney for services in a suit arising upon one of many claims affecting the same client in the same way, which are treated by the attorney and client as a unit, and the merits of which are settled by one suit, it is proper to consider the entire amount involved, rather than the amount involved in the suit which was tried.<sup>2</sup> But where the attorney does not represent all of the interests involved, the whole amount should not be considered; thus the fees of an attorney representing only some of those who have filed a creditors' bill should be fixed with reference to the interests represented by him, and not solely with reference to the amount of the whole fund brought into court for distribution.<sup>3</sup> Where the suit, or other legal business, has been settled or otherwise adjusted by the client, the attorney is usually confined to the reasonable value of the services rendered by him,<sup>4</sup> and, as bearing on this question, it has been held that the amount which would probably be recovered, had there been no settlement, may be taken into consideration.<sup>5</sup> It is evident that the responsibility, the care, anxiety, and mental labor, is much greater in a case where the amount in controversy is large than where it is insignificant, although, perhaps, the same questions might be raised in each case, or the more difficult questions arise in the case wherein the amount was of but slight consequence. Nor is this responsibility, care and mental labor dependent alone upon the number of hours or days which may be given to the preparation and trial or argu-

<sup>19</sup> *Morehead's Trustee v. Anderson*, 100 S. W. 340, 30 Ky. L. Rep. 1137.

<sup>20</sup> *Kentucky Bank v. Combs*, 7 Pa. St. 543.

<sup>1</sup> *Babbitt v. Bumpus*, 73 Mich. 331, 41 N. W. 417, 16 Am. St. Rep. 585.

<sup>2</sup> *Bruce v. Dickey*, 116 Ill. 527, 6 N. E. 435.

<sup>3</sup> *Hines v. Brunswick & A. R. Co.*, 50 Ga. 563.

<sup>4</sup> See *supra*, §§ 456-460.

<sup>5</sup> *Berry v. Davis*, 34 Ia. 594.

ment of the case; or so imaginative and shadowy that it should not be considered in arriving at the amount of compensation which should be allowed in fixing the value of the attorney's services.<sup>6</sup> While the labor of drawing a pleading may be no more when the amount involved is large than when it is small, yet the labor in the examination of authorities and documents preliminary to drawing it, and the care bestowed upon the pleading itself, would be much greater in one case than in the other.

§ 538. **Result.** — In actions for compensation it is competent, as a general rule, to show the result of the litigation in which the services were rendered.<sup>7</sup> In law, as in war, success is one test of ability. The military man who wins many victories will be called an able general, and a lawyer who is pressed with professional engagements shows one of the incidents of legal eminence.<sup>8</sup>

§ 539. **Benefit to Client.** — So, in some jurisdictions, it has been held to be competent to show the direct benefits derived by the client from the litigation,<sup>9</sup> or a favorable settlement

<sup>6</sup> *Eggleston v. Boardman*, 37 Mich. 14.

<sup>7</sup> *United States*.—*Lombard v. Bayard*, 1 Wall. Jr. 196, 15 Fed. Cas. No. 8,469.

*Florida*.—*Young v. Whitney*, 18 Fla. 54.

*Indiana*.—*McFadden v. Ferris*, 6 Ind. App. 454, 32 N. E. 107.

*Iowa*.—*Stevens v. Ellsworth*, 95 Ia. 231, 63 N. W. 683; *Clark v. Ellsworth*, 104 Ia. 442, 73 N. W. 1023.

*Kentucky*.—*Stucky v. Smith*, 148 Ky. 401, 146 S. W. 1128.

*Michigan*.—*Eggleston v. Boardman*, 37 Mich. 14.

*New York*.—*People v. Bond Street Sav. Bank*, 10 Abb. N. Cas. 15.

*Ohio*.—*Holmes v. Holland*, 11 Ohio Dec. (Reprint) 768, 29 Cine. L. Bul. 115.

*Pennsylvania*.—*Heblich v. Slater*, 217 Pa. St. 404, 66 Atl. 655.

<sup>8</sup> *Phelps v. Hunt*, 40 Conn. 97.

<sup>9</sup> *Cusick v. Boyne*, 1 Cal. App. 643, 82 Pac. 985; *Clark v. Ellsworth*, 104 Ia. 442, 73 N. W. 1023; *Trimble v. Aeme Mills & Elevator Co.*, 151 Ky. 570, 152 S. W. 561; *Breaux v. Franke*, 30 La. Ann. 336; *Rutland v. Cobb*, 32 La. Ann. 857; *International & G. N. R. Co. v. Clark*, 81 Tex. 48, 16 S. W. 631.

*Compare Robbins v. Harvey*, 5 Conn. 335, wherein it was said that "the value of services is entirely detached from the consideration of their ultimate benefit to the person rendering them. . . . The inquiry under a *quantum meruit* is not what benefits, immediate and remote, have been derived from the services. If it



thereof.<sup>10</sup> But it is not competent to give evidence of prospective or remote benefits.<sup>11</sup> Nor can the attorney show that a settlement, which he obtained for his client, was much more favorable than that secured by other litigants who were placed in the same situation.<sup>12</sup> And where the action is brought on an express contract, evidence of the benefits derived by the client is inadmissible.<sup>13</sup>

**§ 540. Client's Wealth or Poverty.** — So, also, it has been held that where the subject-matter of the litigation is of great importance to the litigants, and of a character to lead them to use every legitimate effort to succeed, the wealth of a party, and his consequent ability to make a severe contest, may be considered in connection with his disposition to do so, not only because it tends to show the importance and value of the services which the attorney was required to render,<sup>14</sup> but also as an aid in ascertaining the importance and gravity of the interests involved,<sup>15</sup> and in determining whether or not the client is able to pay a fair and just compensation for the services rendered.<sup>16</sup> If the plaintiff, in consideration of the poverty of some of several joint litigants, settles with them for a lesser sum than his services were really worth, or if the services rendered for any one of them were greater or more valuable than those rendered for the others, these matters should be brought to the attention of the jury by a request for special instructions.<sup>17</sup> It is true, of course, that the humble and the poor, whose life, liberty, reputation or property is imperilled, attach

were, the preserving a man's life by stopping a horse in full career, on request, might require as a compensation, a splendid fortune. But the question is what is the general worth of certain services rendered, or goods sold."

<sup>10</sup> *Haish v. Payson*, 107 Ill. 365; *Berry v. Davis*, 34 Ia. 594.

<sup>11</sup> *Robbins v. Harvey*, 5 Conn. 335; *Phelps v. Hunt*, 43 Conn. 194; *Haish v. Payson*, 107 Ill. 365, 5 Ky. L. Rep. 1, 15 Chicago Leg. N. 307.

<sup>12</sup> *Haish v. Payson*, 107 Ill. 365, 5 Ky. L. Rep. 1, 15 Chicago Leg. N. 307.

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<sup>13</sup> *Robbins v. Harvey*, 5 Conn. 335; *Darrin v. Clay*, 143 App. Div. 937, 128 N. Y. S. 346. And see also *supra*, § 531.

<sup>14</sup> *Lombard v. Bayard*, 1 Wall. Jr. 196, 15 Fed. Cas. No. 8,469; *Clark v. Ellsworth*, 104 Ia. 442, 73 N. W. 1023; *Breaux v. Francke*, 30 La. Ann. 336.

<sup>15</sup> *Clark v. Ellsworth*, 104 Ia. 442, 73 N. W. 1023. And see *supra*, § 536.

<sup>16</sup> *Ward v. Kohn*, 58 Fed. 462, 19 U. S. App. 280, 7 C. C. A. 314.

<sup>17</sup> *Cunning v. Kemp*, 22 Wis. 509.

as much importance to their protection as the proud or the wealthy, and that the sum of material and intellectual labor required to defend the first is never less, and often more, than that required to defend the latter; but when the service has been rendered, its value, to be commensurate therewith, should be measured by the client's ability to pay.<sup>18</sup> There is no analogy between professional services and those performed by the ordinary laborer; nor can the creditable fact that where the amount is small, or the client poor, attorneys charge and receive much less than their services may, in fact, have been worth, prevent their recovering reasonable compensation in proportion to the magnitude of the interests committed to their care.<sup>19</sup> But proof of this character must be confined to the time at which the litigation took place,<sup>20</sup> and must also be warranted by the evidence in the case.<sup>1</sup> The value of professional services cannot be enhanced, however, by showing that the client was poor, and that, because thereof, the attorney's chances of being paid depended on his success.<sup>2</sup> On the other hand, it has been held that where the facts are the same, professional services rendered for a poor man are worth no less than the same services performed for a rich man. Certainly, less is often taken from the poor than from the rich, but the reason is not because of a difference in what the service is reasonably worth, but because of a disposition on the part of lawyers to charge less in such cases, even to the extent of making the charge a mere trifle, or a gratuity; and such a practice is to be commended.<sup>3</sup>

§ 541. Usual and Customary Compensation. — It is competent, in actions for compensation, to prove the usual and customary fees charged,<sup>4</sup> for services similar to those for which the

<sup>18</sup> *Breaux v. Francke*, 30 La. Ann. 336.

<sup>19</sup> *Eggleston v. Boardman*, 37 Mich. 14. See also *supra*, § 536. And see note 15 in this section.

<sup>20</sup> *Daly v. Hines*, 55 Ga. 470.

<sup>1</sup> *Hamman v. Willis*, 62 Tex. 507; *International & G. N. R. Co. v. Clark*, 81 Tex. 48, 16 S. W. 631.

<sup>2</sup> *Robbins v. Harvey*, 5 Conn. 335; *Smith v. Couch*, 117 Mo. App. 267, 92 S. W. 1143.

<sup>3</sup> *Stevens v. Ellsworth*, 95 Ia. 231, 63 N. W. 683. And see *supra*, this section, note 19.

<sup>4</sup> *United States v. Stanton v. Embrey*, 93 U. S. 548, 23 U. S. (L. ed.) 983.

compensation is sought,<sup>5</sup> in the vicinity wherein they were rendered;<sup>6</sup> providing, of course, that such charges do not appear to be exorbitant.<sup>7</sup> Where an attorney was employed by a county board for a certain year at a stipulated salary, and was again designated by the same board as its attorney for the year following, without either a resolution or an agreement as to the amount of his compensation, it was held that the action of the board for the second year amounted to a proposition to continue the employment at the salary received during the former employment, and that, having acted as attorney for such year, he thereby accepted such proposition, although, at the time of the second appointment,

*Alabama*.—Fuller v. Stevens, 39 So. 623.

*California*.—Knight v. Russ, 77 Cal. 410, 19 Pac. 698.

*Illinois*.—Reynolds v. McMillan, 63 Ill. 46; Nathan v. Brand, 167 Ill. 607, 47 N. E. 771, affirming 67 Ill. App. 540; National Home Bldg. & Loan Assoc. v. Fifer, 71 Ill. App. 295; Levinson v. Sands, 74 Ill. App. 273; Koedt v. Josephsen, 158 Ill. App. 388.

*Louisiana*.—Cullom v. Mock, 21 La. Ann. 687; Jackson's Succession, 30 La. Ann. 463.

*Maine*.—Bodfish v. Fox, 23 Me. 90, 39 Am. Dec. 611.

*Maryland*.—Calvert v. Coxe, 1 Gill 95. See also Compton v. Barnes, 4 Gill 55, 45 Am. Dec. 115.

*Massachusetts*.—Frost v. Belmont, 6 Allen 152.

*New York*.—Allison v. Scheeper, 9 Daly 365.

*Pennsylvania*.—Thompson v. Boyle, 85 Pa. St. 477; Playford v. Hutchinson, 135 Pa. St. 426, 19 Atl. 1019; Heblich v. Slater, 217 Pa. St. 404, 66 Atl. 655.

*Vermont*.—Vilas v. Downer, 21 Vt. 419.

<sup>5</sup> *United States*.—Stanton v. Em-

brey, 93 U. S. 548, 23 U. S. (L. ed.) 983.

*Alabama*.—Fuller v. Stevens, 39 So. 623.

*California*.—Knight v. Russ, 77 Cal. 410, 19 Pac. 698.

*Connecticut*.—Robbins v. Harvey, 5 Conn. 335.

*Kentucky*.—See also Morehead v. Anderson, 125 Ky. 77, 100 S. W. 340.

*Illinois*.—Hughes v. Ferriman, 119 Ill. App. 169.

*Missouri*.—Southgate v. Atlantic & P. R. Co., 61 Mo. 89; Goldsmith v. St. Louis Candy Co., 85 Mo. App. 595.

*Pennsylvania*.—Thompson v. Boyle, 85 Pa. St. 477.

*Vermont*.—Vilas v. Downer, 21 Vt. 419.

<sup>6</sup> *California*.—Knight v. Russ, 77 Cal. 410, 19 Pac. 698.

*Illinois*.—Wilson v. Hart, 129 Ill. App. 329; Crane v. Roselle, 157 Ill. App. 595.

*Iowa*.—Stanberry v. Dickerson, 35 Ia. 493; Clark v. Ellsworth, 104 Ia. 442, 73 N. W. 1023.

*Vermont*.—Vilas v. Downer, 21 Vt. 419.

<sup>7</sup> Nathan v. Brand, 167 Ill. 607, 47 N. E. 771, affirming 67 Ill. App. 540.

he stated in the presence of the members of the board that he would not perform the services required of him for the salary which he formerly received.<sup>8</sup> But evidence of this character cannot be carried to the extent of raising collateral issues.<sup>9</sup> Thus, it is not allowable to show the amount of the fees charged by another lawyer in any given case;<sup>10</sup> nor may the plaintiff introduce evidence as to the fees charged by opposing counsel,<sup>11</sup> or by associate counsel,<sup>12</sup> especially in the absence of any showing to the effect that their services were similar, their skill equal, and the time spent the same.<sup>13</sup> Nor is it competent to prove the value of the plaintiff's services in another suit,<sup>14</sup> or in a former argument of the same suit,<sup>15</sup> because there may be peculiar circumstances which assisted in fixing the amount paid in one case, which would not exist in another, or even between counsel of equal standing in the same case, both in the character of the work, and in the amount and kind of preparation required.<sup>16</sup> But the amount which the plaintiff charged to others who were joint litigants with the defendant, and for whom he rendered like services, may be shown.<sup>17</sup> The schedule of fees adopted by a county bar association for professional services is also inadmissible.<sup>18</sup>

<sup>8</sup> *Capps v. Adams County*, 27 Neb. 360, 43 N. W. 114.

<sup>9</sup> *Heblich v. Slater*, 217 Pa. St. 404, 66 Atl. 655.

<sup>10</sup> *Illinois*.—*Bruce v. Dickey*, 116 Ill. 527, 6 N. E. 455.

*Kansas*.—*Ottawa University v. Parkinson*, 14 Kan. 159; *Ottawa University v. Welsh*, 14 Kan. 164.

*Maryland*.—*Calvert v. Coxe*, 1 Gill 95.

*Michigan*.—*Eggleston v. Boardman*, 37 Mich. 14; *Babbitt v. Bumpus*, 73 Mich. 331, 41 N. W. 417, 16 Am. St. Rep. 585.

*New York*.—*Allison v. Scheeper*, 9 Daly 365.

*Pennsylvania*.—*Playford v. Hutchinson*, 135 Pa. St. 426, 19 Atl. 1019; *Heblich v. Slater*, 217 Pa. St. 404, 66 Atl. 655.

<sup>11</sup> *Babbitt v. Bumpus*, 73 Mich. 331, 41 N. W. 417, 16 Am. St. Rep. 585.

<sup>12</sup> *Wells v. Adams*, 7 Colo. 26, 1 Pac. 698; *Ottawa University v. Parkinson*, 14 Kan. 159; *Playford v. Hutchinson*, 135 Pa. St. 426, 19 Atl. 1019; *Heblich v. Slater*, 217 Pa. St. 404, 66 Atl. 655.

<sup>13</sup> *Ottawa University v. Parkinson*, 14 Kan. 159. And see also *supra*, § 534.

<sup>14</sup> *Hart v. Vidal*, 6 Cal. 56; *Eggleston v. Boardman*, 37 Mich. 14.

<sup>15</sup> *Strong v. McConnel*, 5 Vt. 338.

<sup>16</sup> *Eggleston v. Boardman*, 37 Mich. 14. See also *Cunning v. Kemp*, 22 Wis. 509.

<sup>17</sup> *Cunning v. Kemp*, 22 Wis. 509.

<sup>18</sup> *Gaither v. Dougherty*, 38 S. W. 2, 18 Ky. L. Rep. 709.

§ 542. **Offer from Adverse Party.** — The value of an attorney's services cannot be increased, on the one hand, by the fact that he could have been retained on the other side of the litigation, or decreased, on the other hand, by the fact that his clients' adversary made no effort to employ him; nor can it be measured by any estimate as to what would have been a reasonable fee had he been so employed.<sup>19</sup>

§ 543. **Where Services are Rendered in Foreign State.** — Where attorneys are employed to leave the state in which they reside for the purpose of rendering professional services in another state, it has been held that their compensation will be governed by the value of such services in the state of the attorney's residence, rather than in the state in which the services were performed.<sup>20</sup> But it has also been held that, in an action for services rendered in another state, the attorney must allege and prove that such action could be maintained under the laws of such other state, because, in the absence of such allegation and proof, it would be presumed that the common-law rule prevailed, and that there could be no recovery.<sup>1</sup> It will be remembered in this connection, however, that the common-law rule, prohibiting the recovery of compensation by attorneys for professional services, never did prevail in many of the states.<sup>2</sup>

§ 544. **Fees Fixed by Court.** — In several jurisdictions the amount of compensation to which an attorney is entitled in certain proceedings may be fixed by the court,<sup>3</sup> and this is especially

<sup>19</sup> *Steenerson v. Waterbury*, 52 Minn. 211, 53 N. W. 1146.

<sup>20</sup> *Stanberry v. Dickerson*, 35 Ia. 493. See also *Stevens v. Ellsworth*, 95 Ia. 231, 63 N. W. 683.

As to the right to compensation for services performed in a state wherein the attorney is not admitted to practice, see *supra*, § 23.

<sup>1</sup> *Williams v. Dodge*, 8 Misc. 317, 28 N. Y. S. 729.

<sup>2</sup> See *supra*, § 404.

<sup>3</sup> *Arkansas*.—*Bell v. Welch*, 38 Ark.

139; *Lilly v. Robinson Mercantile Co.*, 153 S. W. 820.

*California*.—*Reid v. Warren Imp. Co.*, 17 Cal. App. 746, 121 Pac. 694.

*Kentucky*.—*Petry v. Nelson*, 144 Ky. 1, 137 S. W. 783; *Gaylord v. Nelson*, 7 Ky. L. Rep. 821.

*Louisiana*.—*Dorsey v. His Creditors*, 5 Mart. N. S. 399; *Baldwin v. Carleton*, 15 La. 394.

*Massachusetts*.—*Taft v. Shaw*, 159 Mass. 592, 35 N. E. 88.

true as to compensation for services rendered in suits in equity.<sup>4</sup> As a general rule, the court's decision, in cases of this character, is based either on the evidence in the cause, or on evidence taken for the special purpose of ascertaining the value of the attorney's services.<sup>5</sup> But in some jurisdictions, under statutory regulation, the court acts as an expert,<sup>6</sup> guided only by a conscientious estimate of the value of the services rendered.<sup>7</sup> It is not bound by the plaintiff's testimony,<sup>8</sup> or by that of witnesses.<sup>9</sup> The court may, however, call to its aid the evidence of members of the bar.<sup>10</sup> The order of the court, in such cases, has the force and effect of the verdict of a jury,<sup>11</sup> and is presumptive evidence of the fact that the fees allowed are not exorbitant.<sup>12</sup> Nor will it be reversed by an appellate tribunal unless it clearly appears to be unjust.<sup>13</sup>

### *Expert Testimony.*

§ 545. **Necessity of Expert Testimony.**—While, as stated heretofore, it is incumbent on an attorney who sues for compensation to prove the value of his services,<sup>14</sup> it is not necessary that he should do so by the testimony of expert witnesses;<sup>15</sup> any other com-

*Oklahoma.*—McDonald v. Carpenter, 11 Okla. 115, 65 Pac. 942. And see also *supra*, §§ 480-483.

<sup>4</sup> Rogers v. O'Mary, 95 Tenn. 514, 32 S. W. 462; Horton v. Gillinwaters, (Tenn.) 41 S. W. 1083; Taylor v. Badoux, (Tenn.) 58 S. W. 919. And see also *supra*, §§ 477-479.

<sup>5</sup> Bell v. Welch, 38 Ark. 139.

<sup>6</sup> Baldwin v. Carleton, 15 La. 394; Rabasse's Succession, 51 La. Ann. 590, 25 So. 326; Dinkelspiel v. Pons, 119 La. 236, 43 So. 1018.

<sup>7</sup> Eddin v. Richardson, 4 La. Ann. 502; Dinkelspiel v. Pons, 119 La. 236, 43 So. 1018.

<sup>8</sup> Germania Safety Vault & Trust Co.'s Assignee v. Hargis, 64 S. W. 516, 23 Ky. L. Rep. 874.

<sup>9</sup> Dorsey v. His Creditors, 5 Mart. N. S. (La.) 399; Succession of Martiny, 3 La. Ann. 517; Succession of

Lee, 4 La. Ann. 578; Cullom v. Mock, 21 La. Ann. 687; Randolph v. Carroll, 27 La. Ann. 467; Dinkelspiel v. Pons, 119 La. 236, 43 So. 1018.

<sup>10</sup> McMullen v. Reynolds, 209 Ill. 504, 70 N. E. 1041, *reversing* 105 Ill. App. 386; Succession of Jackson, 30 La. Ann. 463.

<sup>11</sup> Hall v. Gunter, 157 Ala. 375, 47 So. 155.

<sup>12</sup> Hays v. Johnson's Adm'r, 99 S. W. 332, 30 Ky. L. Rep. 614.

<sup>13</sup> Dills v. Auxier, 85 S. W. 743, 27 Ky. L. Rep. 531.

<sup>14</sup> See *supra*, § 529.

<sup>15</sup> *California.*—Spencer v. Collins, 156 Cal. 298, 20 Ann. Cas. 49, 104 Pac. 320.

*Colorado.*—Bourke v. Whiting, 19 Colo. 1, 34 Pac. 172.

*Kansas.*—Nofztger v. Moffett, 63 Kan. 354, 65 Pac. 670.

petent evidence which establishes the character and importance of the litigation or other business wherein the services were rendered, the time spent thereon, the labor involved, and the result, will be sufficient for this purpose.<sup>16</sup> It seems to be conceded, however, that the value of an attorney's services can best be shown by the evidence of those persons who are engaged in the same profession,<sup>17</sup> and, therefore, testimony of this character is sanctioned by reason and usage where the question involved is one of reasonable compensation.<sup>18</sup>

**§ 546. Admissibility of Expert Testimony.** — It is universally agreed that expert testimony may be introduced for the pur-

*Michigan*.—Kelley v. Richardson, 69 Mich. 430, 37 N. W. 514.

*Missouri*.—Gibbons v. Missouri Pac. R. Co., 40 Mo. App. 146.

<sup>16</sup> Nofztger v. Moffett, 63 Kan. 354, 65 Pac. 670.

<sup>17</sup> *Illinois*.—Louisville, N. A. & C. R. Co. v. Wallace, 136 Ill. 87, 25 N. E. 493, 11 L.R.A. 787.

*Indiana*.—Blizzard v. Applegate, 61 Ind. 368.

*Kentucky*.—Morehead v. Anderson, 125 Ky. 77, 100 S. W. 340.

*Minnesota*.—Allis v. Day, 14 Minn. 516.

*Pennsylvania*.—Thompson v. Boyle, 85 Pa. St. 477.

<sup>18</sup> Clark v. Ellsworth, 104 Ia. 442, 73 N. W. 1023. And see the section following.

"The question [the value of an attorney's services] is one upon which, from the nature of the case, it is not practicable to furnish more definite evidence than the opinions of witnesses who show themselves qualified to form well-grounded estimates of such value by their familiarity with the department of business in which such services have been rendered.

. . . There is no fixed standard by which their value can be determined: their value and reasonable price vary with the magnitude and importance of the particular case, the degree of responsibility attaching to its management, the difficulty of the questions involved, the ability and reputation of counsel engaged, the labor bestowed, and other matters which will readily occur to the profession. The experience and knowledge of ordinary jurymen do not qualify them to form an opinion as to the value of services of this kind. . . . On the other hand, practicing lawyers occupy the position of experts as to questions of this nature; from the character of their business they are not only in the habit of estimating the value of professional services, but they enjoy peculiar advantages for so doing; their opinions of such value should therefore be received, not only because they are qualified to perform them, but because it appears to be impracticable to furnish any more satisfactory evidence." Allis v. Day, 14 Minn. 516.

pose of establishing the reasonable value of an attorney's services,<sup>19</sup> and this, it seems, is true even though such services consisted of a commingling of professional and business aid.<sup>20</sup> Indeed, testi-

<sup>19</sup> *United States*.—*Head v. Hargrave*, 105 U. S. 45, 26 U. S. (L. ed.) 1028; *Greeff v. Miller*, 87 Fed. 33.

*Alabama*.—*Fuller v. Stevens*, 39 So. 623.

*California*.—*Crescent Canal Co. v. Montgomery*, 126 Cal. 197, 61 Pac. 940; *Fairechild v. Whitmore*, 6 Cal. App. 52, 91 Pac. 336.

*Colorado*.—*Bachman v. O'Reilly*, 14 Colo. 433, 24 Pac. 546; *Fairbanks, Morse & Co. v. Weeber*, 15 Colo. App. 268, 62 Pac. 368; *Wilson v. Union Distilling Co.*, 16 Colo. App. 429, 66 Pac. 170.

*Illinois*.—*Jevne v. Osgood*, 57 Ill. 340; *Haish v. Payson*, 107 Ill. 365, 5 Ky. L. Rep. 1, 15 Chicago Leg. N. 307; *Louisville, N. A. & C. R. Co., v. Wallace*, 136 Ill. 87, 26 N. E. 493, 11 L.R.A. 787; *Lee v. Lomax*, 219 Ill. 218, 76 N. E. 377; *Levinson v. Sands*, 74 Ill. App. 273; *Sexton v. Bradley*, 110 Ill. App. 495.

*Indiana*.—*Covey v. Campbell*, 52 Ind. 157.

*Iowa*.—*Clark v. Ellsworth*, 104 Ia. 442, 73 N. W. 1023.

*Kansas*.—*Anthony v. Stinson*, 4 Kan. 211; *Ottawa University v. Parkinson*, 14 Kan. 159; *Central Branch Union Pac. R. Co. v. Nichols*, 24 Kan. 242; *Gregory Grocery Co. v. Beaton*, 10 Kan. App. 256, 62 Pac. 732.

*Kentucky*.—*Morehead v. Anderson*, 125 Ky. 77, 100 S. W. 340; *Reed v. Reed*, 74 S. W. 207, 24 Ky. L. Rep. 2438.

*Louisiana*.—*Jackson's Succession*, 39 La. Ann. 463; *Dinkelspiel v. Pons*, 119 La. 236, 43 So. 1018.

*Massachusetts*.—*Hunneman v. Phelps*, 199 Mass. 15, 85 N. E. 169.

*Michigan*.—*Kelley v. Richardson*, 69 Mich. 430, 37 N. W. 514; *Turnbull v. Richardson*, 69 Mich. 400, 37 N. W. 499; *Chamberlain v. Rodgers*, 79 Mich. 219, 44 N. W. 598.

*Minnesota*.—*Allis v. Day*, 14 Minn. 516; *Calhoun v. Akeley*, 82 Minn. 354, 85 N. W. 170.

*Mississippi*.—*New Orleans, J. & G. N. R. Co. v. Allbritton*, 38 Miss. 242, 75 Am. Dec. 98.

*Missouri*.—*Brown v. Huffard*, 69 Mo. 305; *State v. Seavey*, 137 Mo. App. 1, 119 S. W. 17.

*New York*.—*Beckman v. Platner*, 15 Barb. 550; *Garfield v. Kirk*, 65 Barb. 464; *Clusman v. Merkel*, 3 Bosw. 402; *Turnbull v. Ross*, 5 Daly 130; *Hatnett v. Garvey*, 66 N. Y. 641; *Bramble v. Hunt*, 68 Hun 204, 22 N. Y. S. 842; *Smith v. Hoctor*, 51 Misc. 649, 99 N. Y. S. 843.

*Ohio*.—*Williams v. Brown*, 28 Ohio St. 547; *Kittredge v. Armstrong*, 11 Ohio Dec. (Reprint) 661, 28 Cine. L. Bul. 249; *Holmes v. Holland*, 11 Ohio Dec. (Reprint) 768, 29 Cine. L. Bul. 115.

*Pennsylvania*.—*Thompson v. Boyle*, 85 Pa. St. 477.

*South Dakota*.—*Frye v. Ferguson*, 6 S. D. 392, 61 N. W. 161; *Fowler v. Iowa Land Co.*, 18 S. D. 131, 99 N. W. 1095.

*Vermont*.—*Carpenter v. Gibson*, 82 Vt. 336, 73 Atl. 1030.

<sup>20</sup> *Kelley v. Richardson*, 69 Mich. 430, 37 N. W. 514.



mony of this character does not differ in principle from expert evidence as to the value of labor in other departments of business, or as to the value of property.<sup>1</sup> So, opinion evidence is competent as to the necessity of making certain disbursements,<sup>2</sup> and as to the character of the services rendered,<sup>3</sup> and whether they were reasonably required for the proper conduct of the case.<sup>4</sup>

But where an attorney's right to compensation, and the amount thereof, has been fixed by a valid subsisting contract with his client, the parties will be bound thereby, and there is no room for the introduction of expert testimony as to the value of the attorney's services.<sup>5</sup> Of course, there are instances wherein the reasonable value of professional services may be established by expert testimony notwithstanding the existence of a contract of employment; thus, such proof is admissible where the amount of compensation is not fixed by the contract,<sup>6</sup> and as to the value of services rendered beyond its scope.<sup>7</sup> But an attorney who has been discharged from a case which he was employed to conduct for a contingent fee, cannot, in an action for his compensation, introduce expert testimony for the purpose of showing what would have been the result of the case if he had been allowed to continue the prosecution thereof.<sup>8</sup>

**§ 547. Qualification of Expert Witness.**—It is absolutely necessary that the witness, whose opinion evidence is offered, should be one duly qualified to so testify.<sup>9</sup> As a general rule, a witness will be deemed to be sufficiently qualified to give his opinion as to the value of counsel services where it appears that

<sup>1</sup> *Head v. Hargrave*, 105 U. S. 45, 26 U. S. (L. ed.) 1028; *Clark v. Ellsworth*, 104 Ia. 442, 73 N. W. 1023; *Cosgrove v. Leonard*, 134 Mo. 419, 33 S. W. 777, 35 S. W. 1137; *Kittredge v. Armstrong*, 11 Ohio Dec. (Reprint) 661, 28 Cinc. L. Bul. 249.

<sup>2</sup> *Artz v. Robertson*, 50 Ill. App. 27.

<sup>3</sup> *Garfield v. Kirk*, 65 Barb. (N. Y.) 464.

<sup>4</sup> *Artz v. Robertson*, 50 Ill. App. 27.

<sup>5</sup> See *supra*, § 439.

<sup>6</sup> See *supra*, § 442.

<sup>7</sup> See *supra*, § 441.

<sup>8</sup> *Breathitt Coal, Iron & Lumber Co. v. Gregory*, 78 S. W. 148, 25 Ky. L. Rep. 1507; *Aldrich v. Brown*, 103 Mass. 527.

<sup>9</sup> *Wilson v. Hart*, 129 Ill. App. 329; *Blizzard v. Applegate*, 61 Ind. 368; *Fry v. Estes*, 52 Mo. App. 1; *State v. Seavey*, 137 Mo. App. 1, 119 S. W. 17.

he is a member of the bar in good standing and engaged in active practice;<sup>10</sup> and it has been held that expert testimony is none the less competent because the witness was not actively engaged in the practice of his profession,<sup>11</sup> or that he had no actual experience in the rendition of services similar to those performed by the plaintiff.<sup>12</sup> So, the plaintiff may testify in his own behalf as to his knowledge of the charges of other attorneys for services similar to those rendered by him.<sup>13</sup> Some cases support the view that opinion evidence as to the value of an attorney's services can only be given by lawyers,<sup>14</sup> and it is to be observed that in practically all of the cases cited in the preceding sections of this subdivision, the witnesses called as experts were, in fact, members of the bar;<sup>15</sup> on the other hand, it has been held that any one who is familiar with the customary and usual charges of lawyers for services similar to those for which compensation is sought, and in the locality where such services were rendered, may qualify as an expert in this respect, even though he is not a member of the bar.<sup>16</sup>

<sup>10</sup> *Bachman v. O'Reilly*, 14 Colo. 433, 24 Pac. 546; *Ottawa University v. Parkinson*, 14 Kan. 159. See also *Central Branch Union Pac. R. Co. v. Nichols*, 24 Kan. 242.

<sup>11</sup> *Blizzard v. Applegate*, 61 Ind. 368; *Hand v. Church*, 39 Hun (N. Y.) 303.

<sup>12</sup> *Bachman v. O'Reilly*, 14 Colo. 433, 24 Pac. 546.

*Compare Bettens v. Fowler*, 51 Super. Ct. (N. Y.) 166, wherein a referee's finding, that an attorney's services were worth a certain sum, was set aside where it appeared that the witnesses, on whose testimony the finding was based, were unfamiliar with the rates of customary charges in similar cases, and where witnesses possessing the requisite familiarity testified that the services were worth much less.

<sup>13</sup> *Babbitt v. Bumpus*, 73 Mich. 331, 41 N. W. 117, 16 Am. St. Rep. 585.

Where an attorney is testifying as an expert to the value of professional services rendered by himself, it is discretionary with the court whether he may be cross-examined as to the amount of his income. *Harland v. Lilienthal*, 53 N. Y. 438.

<sup>14</sup> *Hart v. Vidal*, 6 Cal. 56; *Howell v. Smith*, 108 Mich. 350, 66 N. W. 218. See also *Gregory Grocery Co. v. Beaton*, 10 Kan. App. 256, 62 Pac. 732.

<sup>15</sup> See *supra*, §§ 545-550.

<sup>16</sup> *United States*.—*Head v. Hargrave*, 105 U. S. 45, 26 U. S. (L. ed.) 1028.

*Indiana*.—*McNiel v. Davidson*, 37 Ind. 336.

*Kansas*.—*Gregory Grocery Co. v. Beaton*, 10 Kan. App. 256, 62 Pac. 732.

*Kentucky*.—*Gaither v. Dougherty*, 38 S. W. 2, 18 Ky. L. Rep. 709.

### § 548. Knowledge of Charges in Particular Locality. —

In some jurisdictions it is held that, in order to be competent to testify as an expert as to the reasonable value of an attorney's compensation, it is essential that the witness should be familiar with the usual and customary charges for similar services in the locality wherein the services involved were performed.<sup>17</sup> This rule is based on the theory that the compensation usually paid to lawyers varies so much that what would be a reasonable charge in one place cannot be regarded as a criterion for what would be a reasonable charge for the same services in another place. Lawyers, in charging fees, are governed not only by the length of time consumed by their services, the amount in controversy, and the importance and difficulty of the issues involved, but also by the cost of living and the expense of maintaining a suitable office and office force. Indeed, it is a matter of common knowledge that attorney's fees are higher in some states than in others, and, in the same state, are much higher in large cities than in small towns; and frequently there is a marked difference in this respect even between cities or towns of equal size and importance.<sup>18</sup> Thus, it has been held to be error to permit Chicago attorneys, who were familiar only with the charges made there, to testify as to what was a reasonable charge for services rendered in Arizona;<sup>19</sup> but it has also been held that a lawyer, who was familiar only with the customary charges for professional services in Nebraska, might be permitted to testify as to the value of professional services rendered in South Dakota, there being nothing to indicate that their value should be estimated upon a different basis or by a different rule.<sup>20</sup> Where a hypothetical question shows where the services in question were rendered, it is not necessary that it ask expressly what the value thereof was at that place.<sup>21</sup>

*Michigan*.—*Kelley v. Richardson*, 69 Mich. 430, 37 N. W. 514.

*New York*.—*Hand v. Church*, 39 Hun 303.

*Ohio*.—*Kittredge v. Armstrong*, 11 Ohio Dec. (Reprint) 661, 28 Circ. L. Bul. 249.

<sup>17</sup> *Wilson v. Hart*, 129 Ill. App. 329; *Stevens v. Ellsworth*, 95 Ia. 232, 63

N. W. 683; *Clark v. Ellsworth*, 104 Ia. 442, 73 N. W. 1023.

<sup>18</sup> *State v. Seavey*, 137 Mo. App. 1, 119 S. W. 17.

<sup>19</sup> *Wilson v. Hart*, 129 Ill. App. 329.

<sup>20</sup> *Frye v. Ferguson*, 6 S. D. 392, 61 N. W. 161.

<sup>21</sup> *Clark v. Ellsworth*, 104 Ia. 442, 73 N. W. 1023.

§ 549. **Basis of Opinion.** — The opinion evidence of experts as to the value of professional services must be based on the actual facts in the case wherein the services were rendered;<sup>1</sup> and the usual inquiry is as to what is the customary charge,<sup>2</sup> or what is a fair and reasonable charge, for the services rendered,<sup>3</sup> taking into consideration the nature and character thereof, the labor, time, and trouble involved, the nature and importance of the litigation or other business in which the plaintiff was engaged as an attorney, the amount of money or the value of the property involved, the skill and experience called for, and the professional character and standing of the attorney;<sup>4</sup> these matters have been specifically considered heretofore.<sup>5</sup> In some states the reasonable value of a retaining fee may also be taken into consideration by the witness.<sup>6</sup> It has also been held that a qualified witness may base his opinion

**1 Illinois.**—*People's Casualty Claim Adjustment Co. v. Darrow*, 70 Ill. App. 22, *affirming* 172 Ill. 62, 49 N. E. 1005.

**Indiana.**—*Covey v. Campbell*, 52 Ind. 157.

**Iowa.**—*Clark v. Ellsworth*, 104 Ia. 442, 73 N. W. 1023.

**Kansas.**—*Central Branch Union Pac. R. Co. v. Nichols*, 24 Kan. 242.

**Kentucky.**—*Morehead's Trustee v. Anderson*, 125 Ky. 77, 100 S. W. 340.

**Michigan.**—*Turnbull v. Richardson*, 69 Mich. 400, 37 N. W. 499; *Kelley v. Richardson*, 69 Mich. 430, 37 N. W. 514.

**Missouri.**—*Southgate v. Atlantic & P. R. Co.*, 61 Mo. 89.

**New York.**—*Clusman v. Merkel*, 3 Bosw. 402; *Harnett v. Garvey*, 66 N. Y. 641.

**Ohio.**—*Williams v. Brown*, 28 Ohio St. 547.

**2** *Wilson v. Union Distilling Co.*, 16 Colo. App. 429, 66 Pac. 170; *Jevne v. Osgood*, 57 Ill. 340; *Louisville, N. A. & C. R. Co. v. Wallace*, 136 Ill. 87, 26 N. E. 493, 11 L.R.A. 787; *Maneaty v.*

*Steele*, 112 Ill. App. 19; *Bettens v. Fowler*, 51 Super. Ct. (N. Y.) 166.

**3** *Louisville, N. A. & C. R. Co. v. Wallace*, 136 Ill. 87, 26 N. E. 493, 11 L.R.A. 787; *Sexton v. Bradley*, 110 Ill. App. 495.

**4** *Illinois.*—*Haish v. Payson*, 107 Ill. 365; *Louisville, N. A. & C. R. Co. v. Wallace*, 136 Ill. 87, 26 N. E. 493, 11 L.R.A. 787.

**Indiana.**—*Covey v. Campbell*, 52 Ind. 157.

**Iowa.**—*Clark v. Ellsworth*, 104 Ia. 442, 73 N. W. 1023.

**Kansas.**—*Central Branch Union Pac. R. Co. v. Nichols*, 24 Kan. 242.

**Kentucky.**—*Morehead v. Anderson*, 125 Ky. 77, 100 S. W. 340.

**Massachusetts.**—*Aldrich v. Brown*, 103 Mass. 527; *Caverly v. McOwen*, 123 Mass. 574.

**New York.**—*Garfield v. Kirk*, 65 Barb. 464; *Harland v. Lilienthal*, 53 N. Y. 438; *Schlesinger v. Dunne*, 36 Misc. 529, 73 N. Y. S. 1014.

**5** See *supra*, §§ 534-542.

**6** *Roche v. Baldwin*, 143 Cal. 186, 76 Pac. 956. See also *supra*, § 406.

on his personal knowledge of the facts,<sup>7</sup> or both on his personal knowledge and the evidence in the cause.<sup>8</sup> So, also, evidence of the character indicated may be introduced by the defendant, or brought out by his cross-examination of the plaintiff's witnesses.<sup>9</sup> But the plaintiff cannot read in evidence a judicial opinion and incorporate an extract therefrom in a hypothetical question, addressed to an expert, as to the value of professional services.<sup>10</sup>

§ 550. **Weight of Expert Evidence.**—The general rule is that, although entitled to great weight, the evidence of experts as to the value of an attorney's services is not conclusive, but that it should be intelligently examined by the jury in the light of their own general knowledge,<sup>11</sup> and the other evidence in the case, in

<sup>7</sup> *Ottawa University v. Parkinson*, 14 Kan. 159; *Brown v. Huffard*, 69 Mo. 305.

<sup>8</sup> *Garfield v. Kirk*, 65 Barb. (N. Y.) 464.

<sup>9</sup> *Fuller v. Stevens*, (Ala.) 39 So. 623.

<sup>10</sup> *Crawford v. Tyng*, 2 Misc. 469, 21 N. Y. S. 1041.

<sup>11</sup> *United States*.—*Head v. Hargrave*, 105 U. S. 45, 26 U. S. (L. ed.) 1028; *Sanders v. Graves*, 105 Fed. 849, *affirmed* 125 Fed. 690, 60 C. C. A. 422.

*California*.—*In re Dorland*, 63 Cal. 281.

*Colorado*.—*Bourke v. Whiting*, 19 Colo. 1, 34 Pac. 172.

*Illinois*.—*Lee v. Lomax*, 219 Ill. 218, 76 N. E. 377; *Dorsey v. Corn*, 2 Ill. App. 533; *Crane v. Roselle*, 157 Ill. App. 595.

*Indiana*.—*Williams v. Boyd*, 75 Ind. 286.

*Iowa*.—*Arndt v. Hosford*, 82 Ia. 499, 48 N. W. 981; *Clark v. Ellsworth*, 104 Ia. 442, 73 N. W. 1023; *Graham v. Dillon*, 144 Ia. 82, 121 N. W. 47.

*Kansas*.—*Noftzger v. Moffett*, 63 Kan. 354, 65 Pac. 670.

*Kentucky*.—*Morehead v. Anderson*, 125 Ky. 77, 100 S. W. 340.

*Louisiana*.—*Randolph v. Carroll*, 27 La. Ann. 467; *Dinkelspiel v. Pons*, 119 La. 236, 43 So. 1018.

*Michigan*.—*Turnbull v. Richardson*, 69 Mich. 400, 37 N. W. 499.

*Missouri*.—*Rose v. Spies*, 44 Mo. 20; *Cosgrove v. Leonard*, 134 Mo. 419, 33 S. W. 777, 35 S. W. 1137; *Gibbons v. Missouri Pac. R. Co.*, 40 Mo. App. 146; *Kingsbury v. Joseph*, 94 Mo. App. 298, 68 S. W. 93; *Brownrigg v. Massengale*, 97 Mo. App. 190, 70 S. W. 1103.

*New York*.—*Chatfield v. Hewlett*, 2 Dem. 191; *Bramble v. Hunt*, 68 Hun 204, 22 N. Y. S. 842; *Mack v. Miller*, 87 App. Div. 359, 84 N. Y. S. 440; *Schlesinger v. Dunno*, 36 Misc. 529, 10 N. Y. Ann. Cas. 350, 73 N. Y. S. 1014; *Pendleton v. Johnston*, 59 Super. Ct. 331, 14 N. Y. S. 629, *affirmed* 133 N. Y. 678, 31 N. E. 626.

*Ohio*.—*Kittredge v. Armstrong*, 11 Ohio Dec. (Reprint) 661, 28 Cine. L. Bul. 249; *Holmes v. Holland*, 11 Ohio Dec. (Reprint) 768, 29 Cine. L. Bul. 115.

arriving at their verdict,<sup>12</sup> and given credit according to its worth.<sup>13</sup>

Where, however, the only evidence offered to prove the value of professional services is that given by witnesses who testify as experts, there is some conflict of opinion as to its conclusiveness; thus it has been held in some cases that the jury will be bound by the opinion evidence,<sup>14</sup> while in other cases it has been held that expert testimony, even though uncontradicted, is not conclusive.<sup>15</sup> But it is beyond question that expert evidence of the character under discussion may, of itself, be sufficient to support a verdict based thereon.<sup>16</sup>

### *Defenses.*

§ 551. **Generally.**—The defendant in an action for the recovery of counsel fees may avail himself of any defense which, un-

*Texas.*—*International & G. N. R. Co. v. Clark*, 81 Tex. 48, 16 S. W. 631, 48 Am. & Eng. R. Cas. 81.

*Washington.*—*Jones v. Jones*, 72 Wash. 517, 130 Pac. 1125.

*Wisconsin.*—*Remington v. Eastern R. Co.*, 109 Wis. 154, 84 N. W. 898, 85 N. W. 321.

<sup>12</sup> *Iowa.*—*Arndt v. Hosford*, 82 Ia. 499, 48 N. W. 981.

*Kentucky.*—*Jordan v. Swift Iron & Steel Works*, 13 Ky. L. Rep. 970, 14 Ky. L. Rep. 194.

*Michigan.*—*Turnbull v. Richardson*, 69 Mich. 400, 37 N. W. 499.

*Missouri.*—*Rose v. Spies*, 44 Mo. 20; *Cosgrove v. Burton*, 104 Mo. App. 698, 78 S. W. 667.

*New York.*—*Randall v. Packard*, 1 Misc. 344, 20 N. Y. S. 716, *affirmed* 142 N. Y. 47, 36 N. E. 823; *Reves v. Hyde*, 14 Daly 431, 13 Civ. Proc. 323, 14 N. Y. St. Rep. 689.

*Ohio.*—*Kittredge v. Armstrong*, 11 Ohio Dec. (Reprint) 661, 28 Cine. L. Bul. 249.

<sup>13</sup> *Blizzard v. Applegate*, 61 Ind. 368.

<sup>14</sup> *United States.*—*Sanders v. Graves*, 105 Fed. 849, *affirmed* 125 Fed. 690, 60 C. C. A. 422.

*Alabama.*—*Moore v. Watts*, 81 Ala. 261, 2 So. 278.

*Illinois.*—*Williams v. Reynolds*, 86 Ill. 263.

*Kentucky.*—*Reed v. Reed*, 74 S. W. 207, 24 Ky. L. Rep. 2438.

*Michigan.*—*See Wood v. Barker*, 49 Mich. 295, 13 N. W. 597; *Walbridge v. Barrett*, 118 Mich. 433, 76 N. W. 973.

*Texas.*—*See Herndon v. Lammers*, 55 S. W. 414.

*Wisconsin.*—*Cotzhausen v. Central Trust Co.*, 79 Wis. 613, 49 N. W. 158.

<sup>15</sup> *Holm v. Parmele-Eccleston Co.*, 13 Misc. 317, 34 N. Y. S. 458; *Schlesinger v. Dunne*, 36 Misc. 529, 10 N. Y. Ann. Cas. 350, 73 N. Y. S. 1014; *Steele v. Hammond*, 136 App. Div. 667, 121 N. Y. S. 589.

<sup>16</sup> *Hazeltine v. Brockway*, 26 Colo.

der the local practice, may be set up in any other action based upon an express or implied contract.<sup>17</sup> Thus, he may show that he never employed the plaintiff,<sup>18</sup> or that the plaintiff failed to perform the business undertaken by him,<sup>19</sup> or was guilty of misconduct in respect thereto,<sup>20</sup> or that the contract for compensation was unfair or otherwise tainted with fraud or illegality,<sup>1</sup> as, for instance, that it was champertous,<sup>2</sup> or that the plaintiff was not, in fact, a qualified attorney at law.<sup>3</sup> So, the defendant may assert the right of set-off and counterclaim.<sup>4</sup> Of course, any defense set up must be

291, 57 Pac. 1077; *Pickett v. Gore*, (Tenn.) 58 S. W. 402.

<sup>17</sup>*Bridges v. Paige*, 13 Cal. 641. And see the following sections of this subdivision.

<sup>18</sup>*Fairchild v. Whitmore*, 6 Cal. App. 52, 91 Pac. 336; *Kellogg v. Rowland*, 40 App. Div. 416, 57 N. Y. S. 1064; *Altkrug v. Horowitz*, 111 App. Div. 420, 97 N. Y. S. 716; *McDonald v. American Mortgage Co.*, 17 Ore. 626, 21 Pac. 883; *Safford v. Vermont & C. R. Co.*, 60 Vt. 185, 14 Atl. 91.

As to the necessity of proving employment, see *supra*, §§ 507-522.

<sup>19</sup>*Alabama*.—*Walker v. Cuthbert*, 10 Ala. 213.

*Arkansas*.—*Brodie v. Watkins*, 33 Ark. 545, 34 Am. Rep. 49.

*California*.—*Foltz v. Cogswell*, 86 Cal. 542, 25 Pac. 60.

*Kentucky*.—*Majors v. Hickman*, 2 Bibb 217.

*Michigan*.—*Willey v. Crane*, 69 Mich. 17, 36 N. W. 734; *Moran v. L'Etourneau*, 118 Mich. 159, 76 N. W. 370, 5 Detroit Leg. N. 471.

*New York*.—*Wendell v. Lewis*, 8 Paige 613; *Frost v. Frost*, 1 Barb. Ch. 492; *Holmes v. Evans*, 59 Super. Ct. 136, 13 N. Y. S. 614, *affirmed* 129 N. Y. 140, 29 N. E. 233.

*Texas*.—*Shaw v. Threadgill*, 53 Tex. Civ. App. 254, 115 S. W. 671; *Higgins*

*v. Matlock*, Miller & Dycus, 95 S. W. 571.

As to the necessity of proving performance, see *supra*, §§ 523-528.

*May Recover on Note before Performance*.—An attorney, taking a note payable on demand for a fee under an agreement to prosecute a suit as rapidly as possible, can recover on the note before the final hearing of such suit. *Burke v. Dorey*, 208 Mass. 45, 94 N. E. 291.

<sup>20</sup>Ignorance or negligence, see *infra*, § 553. Fraud or bad faith, see *infra*, § 555.

*Loss of compensation by compromising case without authority*.—An attorney who compromises his client's case against the latter's express direction is not entitled to any compensation. *Rogers v. Pettigrew*, 138 Ga. 528, Ann. Cas. 1913D 409, 75 S. E. 631, 42 L.R.A. (N.S.) 852.

<sup>1</sup>See *supra*, §§ 428-438.

<sup>2</sup>See *supra*, §§ 386-394.

<sup>3</sup>*Muligan v. Smith*, 32 Colo. 404, 76 Pac. 1063. See also *supra*, § 23.

<sup>4</sup>*Colorado*.—*Bourke v. Whiting*, 19 Colo. 1, 34 Pac. 172.

*Illinois*.—*Bennett v. Connelly*, 103 Ill. 50.

*Indiana*.—*Lupton v. Taylor*, 39 Ind. App. 412, 78 N. E. 689, *rehearing denied* 39 Ind. App. 420, 79 N. E. 523.

established by competent evidence,<sup>5</sup> to the satisfaction of the jury.<sup>6</sup>

**§ 552. Defense Must Be Meritorious.** — It is essential, however, in all cases that the defense asserted should be a meritorious one. Thus, the defendant will not be permitted to prove, as a defense, that the business undertaken by the attorney was adjusted with less labor than had been anticipated,<sup>7</sup> and without litigation,<sup>8</sup> or that the case was without merit,<sup>9</sup> or that other persons were benefited by the plaintiff's services,<sup>10</sup> or that the defendant had also employed other counsel in the same cause,<sup>11</sup> or that the attorney's services did not result beneficially to the client,<sup>12</sup> or that the plaintiff was a lawyer of limited experience,<sup>13</sup> or that he was disbarred subsequently to the rendition of the services in question,<sup>14</sup> or that, a long time prior to the employment involved, the plaintiff had offered to take, for his services, a compensation less than the amount sued for.<sup>15</sup> Nor does the fact that subsequently to his employment the attorney was appointed to a position where it became his official duty to perform the services for which he had

*Iowa.*—*Jamison v. Weaver*, 81 Ia. 212, 46 N. W. 996.

*Massachusetts.*—*Keith v. Marcus*, 181 Mass. 377, 63 N. E. 924.

<sup>5</sup> *Cahill v. Baird*, 138 Cal. 691, 72 Pac. 342, *reversing* 70 Pac. 1061; *Cusick v. Boyne*, 1 Cal. App. 643, 82 Pac. 985; *Goodrich v. Mott*, 9 Vt. 395; *Smith v. Lenz*, 143 Wis. 615, 128 N. W. 280.

<sup>6</sup> See *infra*, § 565.

<sup>7</sup> *Clark v. Ellsworth*, 104 Ia. 442, 73 N. W. 1023; *Walbridge v. Barrett*, 118 Mich. 433, 76 N. W. 973, 5 Detroit Leg. N. 562.

<sup>8</sup> See *supra*, § 525.

<sup>9</sup> *Case v. Hotchkiss*, 1 Abb. Dec. (N. Y.) 324; *Case v. Hotchkiss*, 3 Keyes (N. Y.) 334.

<sup>10</sup> *Kelly v. Ning Yung Benev. Ass'n*, 2 Cal. App. 460, 84 Pac. 321.

<sup>11</sup> *Taylor v. Bosworth*, 1 Ind. App.

54, 27 N. E. 115; *Luchini v. Police Jury*, 126 La. 972, 21 Ann. Cas. 59, 53 So. 68; *Webster v. Loeb*, 112 Mo. App. 139, 86 S. W. 463.

<sup>12</sup> *French v. Cunningham*, 149 Ind. 632, 49 N. E. 797; *Fenner v. McCan*, 49 La. Ann. 600, 21 So. 768; *Caverly v. McOwen*, 126 Mass. 222; *Niemann v. Collyer*, 71 Hun 612, 24 N. Y. S. 516; *Tinney v. Pierrepont*, 18 App. Div. 627, 45 N. Y. S. 977; *Bills v. Polk*, 4 Lea (Tenn.) 494. And see *Trimble v. Guardian Trust Co.*, 244 Mo. 228, 148 S. W. 934.

<sup>13</sup> *Shakespeare v. Baughman*, 113 Mich. 551, 71 N. W. 874, 4 Detroit Leg. N. 392.

<sup>14</sup> *Manning v. Borland*, 83 Me 125, 21 Atl. 837.

<sup>15</sup> *Crowell v. Truax*, 94 Mich. 585, 51 N. W. 384.



been retained, prevent him from recovering the amount agreed upon for the performance of such services prior to his appointment.<sup>16</sup> Nor can the defendant show, by way of defense, that he was harassed by the plaintiff,<sup>17</sup> or that his funds were attached in the attorney's hands,<sup>18</sup> or that the attorney failed to deduct his fees while the funds were in his custody,<sup>19</sup> or, ordinarily, that there was an agreement to arbitrate the claim sued for.<sup>20</sup>

**§ 553. Negligence or Ignorance.** — Where the client has suffered loss or injury because of his attorney's ignorance or negligence, that fact may be set up as a defense to an action for compensation, for the services so performed, brought by the attorney.<sup>1</sup>

<sup>16</sup> *Detroit v. Whittemore*, 27 Mich. 281.

<sup>17</sup> *Davis v. Farwell*, 80 Vt. 166, 67 Atl. 129.

<sup>18</sup> *Daigle v. Bird*, 22 La. Ann. 138.

<sup>19</sup> *Walton v. Dickerson*, 7 Pa. St. 376; *Davis v. Farwell*, 80 Vt. 166, 67 Atl. 129.

<sup>20</sup> *State Bank v. Martin*, 4 Ala. 615.

<sup>1</sup> *England*. — *Hill v. Featherstonhaugh*, 7 Bing. 569, 20 E. C. L. 244; *Sill v. Thomas*, 8 C. & P. 762, 34 E. C. L. 624; *Hill v. Allen*, 2 M. & W. 284; *Long v. Orsie*, 18 C. B. 610, 26 L. J. C. Pl. 127; *In re Metropolitan Coal Consumers' Ass'n*, 45 Ch. D. 606.

*Arkansas*. — *Rachels v. Doniphan Lumber Co.*, 98 Ark. 529, 136 S. W. 658.

*California*. — *Bridges v. Paige*, 13 Cal. 640; *In re Kruger's Estate*, 130 Cal. 621, 63 Pac. 31; *Hinckley v. Krug*, 34 Pac. 118.

*Illinois*. — *Mansfield v. Wallace*, 217 Ill. 610, 75 N. E. 682.

*Indiana*. — *Pennington v. Nave*, 15 Ind. 323; *French v. Cunningham*, 149 Ind. 632, 49 N. E. 797; *O'Halloran v. Marshall*, 8 Ind. App. 394, 35 N. E. 926.

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*Iowa*. — *Lindsay v. Carpenter*, 90 Ia. 529, 58 N. W. 900; *Cullison v. Lindsay*, 108 Ia. 124, 78 N. W. 847.

*Kentucky*. — *Thomas v. Mahone*, 9 Bush 111; *Morehead v. Anderson*, 125 Ky. 77, 100 S. W. 340; *Board of Education v. Rankin*, 142 Ky. 324, 134 S. W. 157; *Buckeer v. Robinson*, 96 S. W. 1110.

*Maine*. — *Timberlake v. Crosby*, 81 Me. 249, 16 Atl. 896.

*Massachusetts*. — *Caverly v. McOwen*, 126 Mass. 222.

*New York*. — *Carter v. Talleot*, 36 Hun 393; *Cole v. Roby*, 61 Hun 624 mem., 16 N. Y. S. 20; *Clussman v. Merkel*, 3 Bosw. 402; *Gleason v. Clark*, 9 Cow. 57; *Hopping v. Quin*, 12 Wend. 517; *Leo v. Leyser*, 36 Misc. 549, 73 N. Y. S. 941; *Dickerson v. Mashek Engineering Co.*, 76 Misc. 263, 134 N. Y. S. 940.

*Pennsylvania*. — *Chain v. Hart*, 140 Pa. St. 374, 21 Atl. 442; *In re Sloan*, 161 Pa. St. 237, 28 Atl. 1084.

*Vermont*. — *Nixon v. Phelps*, 29 Vt. 198; *Davis v. Farwell*, 80 Vt. 166, 67 Atl. 129; *Gordon v. Mead*, 81 Vt. 36, 69 Atl. 134.

Thus, the client may show in defense that his attorney was careless in the institution of legal proceedings,<sup>2</sup> or in the collection of a claim,<sup>3</sup> or that he was unjustifiably dilatory in proceeding with the defendant's business,<sup>4</sup> or made an unauthorized compromise of the claim,<sup>5</sup> or that the cause was improperly conducted,<sup>6</sup> or that the plaintiff failed to introduce certain relevant and material evidence,<sup>7</sup> or had given the defendant erroneous advice.<sup>8</sup> Nor can an attorney recover compensation for services rendered in an action wherein special evidence is made necessary by statute, unless, prior to the commencement of such action, he has ascertained that what the statute requires does, in fact, exist.<sup>9</sup> And where an attorney has testified in his own behalf, he may be cross-examined as to the manner in which he conducted the defendant's litigation or other business, for the purpose of showing carelessness or unskillfulness on his part.<sup>10</sup> In all cases it is essential, of course, that a defense of the character under consideration should be established by the defendant.<sup>11</sup>

*Washington*.—Farwell *v.* Colman, 35 Wash. 308, 77 Pac. 379.

*Wisconsin*.—Armin *v.* Loomis, 82 Wis. 86, 51 N. W. 1097.

<sup>2</sup> Buckler *v.* Robinson, 96 S. W. 1110, 29 Ky. L. Rep. 1174; De Rose *v.* Fay, 4 Edw. (N. Y.) 40.

<sup>3</sup> Pennington *v.* Underwood, 56 Ark. 53, 19 S. W. 108.

<sup>4</sup> Walsh *v.* Shumway, 65 Ill. 471; Thorn *v.* Beard, 135 N. Y. 643 mem., 32 N. E. 140; Farwell *v.* Colman, 35 Wash. 308, 77 Pac. 379.

<sup>5</sup> See *supra*, § 551, note 20.

<sup>6</sup> Pearson *v.* Darrington, 32 Ala. 227; Von Wallhoffen *v.* Newcombe, 10 Hun (N. Y.) 236.

<sup>7</sup> Lindsay *v.* Carpenter, 90 Ia. 529, 58 N. W. 900.

<sup>8</sup> Hinckley *v.* Krug, (Cal.) 34 Pac. 118; Harlock *v.* Le Baron, 1 Civ. Proc. (N. Y.) 168.

<sup>9</sup> Leo *v.* Leyser, 36 Misc. 549, 73 N. Y. S. 941.

<sup>10</sup> Crammer *v.* Building & Loan Ass'n, 6 S. D. 341, 61 N. W. 35.

<sup>11</sup> *Arizona*.—Greene *v.* Hereford, 12 Ariz. 85, 95 Pac. 105.

*California*.—Miner *v.* Riekey, 5 Cal. App. 451, 90 Pac. 718.

*Florida*.—Young *v.* Whitney, 18 Fla. 54.

*Maryland*.—Brewster *v.* Frazier, 32 Md. 302.

*Massachusetts*.—Keith *v.* Marcus, 181 Mass. 377, 63 N. E. 924.

*Michigan*.—Babbitt *v.* Bumpus, 73 Mich. 331, 41 N. W. 417, 16 Am. St. Rep. 585.

*Mississippi*.—Whitehead *v.* Ducker, 11 Smedes & M. 98.

*New York*.—Clusman *v.* Merkel, 3 Bosw. 402; Gleason *v.* Clark, 9 Cow. 57; Bowman *v.* Tallman, 2 Robt. 385; Cohn *v.* Heusner, 9 Misc. 482, 30 N. Y. S. 244; Smith *v.* Hoctor, 51 Misc. 649, 99 N. Y. S. 843.

*Washington*.—Conover *v.* Carpenter, 57 Wash. 146, 106 Pac. 620.

Heretofore, consideration has been given to the liability of an attorney for negligence generally,<sup>12</sup> and the enforcement of such liability.<sup>13</sup>

**§ 554. When Negligence or Ignorance Unavailable as Defense.**—But the mere failure of the attorney to succeed, in the matter undertaken by him, is not evidence of negligence; and, consequently, such failure is no defense to an action brought by him for the recovery of his compensation,<sup>14</sup> excepting, of course, where compensation is made contingent on success.<sup>15</sup> He is neither a guarantor nor an insurer,<sup>16</sup> and is only responsible for his failure to exercise that degree of care, skill, and diligence, that is to be expected from those who hold themselves out to the public as attorneys at law.<sup>17</sup> So, an attorney may explain his reason for delaying the prosecution of his client's cause,<sup>18</sup> consistently with his right to recover compensation for the services which he has rendered therein;<sup>19</sup> for instance, the attorney may recover where it is shown that the delay resulted, not from carelessness, but from a conviction that it would bring about a satisfactory compromise; and, *a fortiori*, would this be true where such a compromise was,

<sup>12</sup> See *supra*, §§ 312–330.

<sup>13</sup> See *supra*, §§ 331–364.

<sup>14</sup> *California*.—Foltz v. Cogswell, 86 Cal. 542, 25 Pac. 60.

*Illinois*.—Singer v. Steele, 24 Ill. App. 58.

*Indiana*.—French v. Cunningham, 149 Ind. 632, 49 N. E. 797.

*Iowa*.—Cullison v. Lindsay, 108 Ia. 124, 78 N. W. 847.

*Michigan*.—Brckett v. Sears, 15 Mich. 244.

*New York*.—Seymour v. Cagger, 13 Hun 29; Deering v. McCallill, 51 Super. Ct. 263.

*Tennessee*.—Bills v. Polk, 4 Lea 494.

*Wisconsin*.—Murphy v. Shepardson, 60 Wis. 412, 19 N. W. 356.

<sup>15</sup> See *supra*, § 423.

<sup>16</sup> See *supra*, § 313.

*Louisiana*.—Succession of Herwig, 127 La. 127, 53 So. 466.

*Michigan*.—Babbit v. Bumpus, 73 Mich. 331, 41 N. W. 417, 16 Am. St. Rep. 585.

*New York*.—Bowman v. Tallman, 27 How. Pr. 212; Porter v. Ruckman, 38 N. Y. 210; Harriman v. Baird, 6 App. Div. 518, 39 N. Y. S. 592, *affirmed* 158 N. Y. 691, 53 N. E. 1126.

*Pennsylvania*.—In re Worrall, 1 Del. Co. Rep. 377.

*Tennessee*.—Fulton v. Davidson, 3 Heisk. 614.

*Washington*.—Isham v. Parker, 3 Wash. 755, 29 Pac. 835.

<sup>17</sup> See *supra*, § 312.

<sup>18</sup> Union Mut. Life Ins. Co. v. Buchanan, 100 Ind. 63.

<sup>19</sup> Union Mut. Life Ins. Co. v. Buchanan, 100 Ind. 63.

in fact, effected.<sup>20</sup> Nor will delay on the part of the original counsel affect the right of assistant counsel, who was ready and willing to perform the services for which he was engaged, to recover his compensation.<sup>1</sup> So, an attorney will not be precluded from recovering compensation merely because he did not participate in certain proceedings, which affected his client's interests, unless he was employed to appear therein,<sup>2</sup> or where the client was not injured because of his attorney's nonappearance,<sup>3</sup> or other neglect;<sup>4</sup> and much less will the attorney's right to compensation be affected where his negligence has been waived by his client,<sup>5</sup> or where the client has, in fact, benefited by the attorney's services.<sup>6</sup>

**§ 555. Fraud or Bad Faith.**—It is well settled that fraud or bad faith on the part of the attorney in the transaction of his client's business may be set up as a defense to an action for compensation, brought by the attorney, for the services in connection with which the fraud or bad faith was displayed.<sup>7</sup> Thus, the at-

<sup>20</sup> *Hennen v. Bourgeat*, 12 Rob. (La.) 522.

<sup>1</sup> *Carter v. Baldwin*, 95 Cal. 475, 30 Pac. 595.

<sup>2</sup> *Pearson v. Darrington*, 32 Ala. 227.

<sup>3</sup> *Douglass v. Eason*, 36 Ala. 687.

<sup>4</sup> *Clussman v. Merkel*, 3 Bosw. (N. Y.) 402; *Mason v. Ring*, 2 Abb. Pr. N. S. (N. Y.) 322.

<sup>5</sup> *Ballard v. Carr*, 48 Cal. 74.

<sup>6</sup> *Murphy v. Shepardson*, 60 Wis. 412, 19 N. W. 356.

<sup>7</sup> *Arkansas*.—*Sparks v. Forrest*, 85 Ark. 425, 108 S. W. 835.

*Connecticut*.—*Brckett v. Norton*, 4 Conn. 517, 10 Am. Dec. 179.

*Georgia*.—*Bailey v. Devine*, 123 Ga. 653, 51 S. E. 603, 107 Am. St. Rep. 153.

*Indiana*.—*U. S. Mortgage Co. v. Henderson*, 111 Ind. 24, 12 N. E. 88.

*Iowa*.—*Donaldson v. Eaton*, 136 Ia.

650, 114 N. W. 19, 125 Am. St. Rep. 275, 14 L.R.A.(N.S.) 1168.

*Kentucky*.—*Mealer v. Gibert*, 60 S. W. 8, 22 Ky. L. Rep. 1223; *Brodie v. Parsons*, 64 S. W. 426, 23 Ky. L. Rep. 831; *Buckler v. Robinson*, 96 S. W. 1110.

*Minnesota*.—*Davis v. Swedish-American Nat. Bank*, 78 Minn. 408, 80 N. W. 953, 81 N. W. 210, 79 Am. St. Rep. 400.

*Nebraska*.—*Olson v. Lamb*, 56 Neb. 104, 76 N. W. 433, 71 Am. St. Rep. 670.

*New York*.—*Murphy v. Banderet*, 13 Daly 385; *Chatfield v. Simonson*, 92 N. Y. 209; *Andrews v. Tyng*, 94 N. Y. 16; *Martin v. Platt*, 5 N. Y. St. Rep. 284. See also *Pallace v. Niagara, L. & O. Power Co.*, 131 App. Div. 453, 115 N. Y. S. 340.

*Pennsylvania*.—*Norris v. Breakwater Co.*, 235 Pa. St. 358, 84 Atl. 358.

torney's right to compensation will be affected where it appears that he assumed an adverse or hostile attitude toward his client, or where, without the consent of his client, he represents third persons whose interests are adverse to those of his client.<sup>8</sup> So, fraud or bad faith on the part of the attorney may be predicated on his failure to inform his client of material facts, and their effect upon the client's business, which were known to the attorney, and were not known to the client;<sup>9</sup> or on the fact that the attorney secured a personal advantage from the transaction of his client's business,<sup>10</sup> as, for instance, by the acquisition of an interest, adverse to that of his client, in the subject-matter of the litigation.<sup>11</sup> The defense under consideration is an affirmative one, and it must—at least *prima facie*—be established by the defendant;<sup>12</sup> but when established, the burden of proving good faith, and an absence of fraud, rests with the attorney.<sup>13</sup> Dealings between attorney and client, the acquisition of adverse interests, and the

<sup>8</sup> *United States*.—See *Baxter v. Lowe*, 93 Fed. 358, 35 C. C. A. 344.

*California*.—De *Celis v. Brunson*, 53 Cal. 372.

*Connecticut*.—*Brackett v. Norton*, 4 Conn. 517, 10 Am. Dec. 179.

*Illinois*.—*Strong v. International B. L. & I. Union*, 82 Ill. App. 426, *affirmed* 183 Ill. 97, 55 N. E. 675, 47 L.R.A. 792.

*Iowa*.—*Bullis v. Easton*, 96 Ia. 513, 65 N. W. 395.

*Kansas*.—*McArthur v. Fry*, 10 Kan. 233.

*Kentucky*.—*Schamberg v. Auxier*, 101 Ky. 292, 40 S. W. 911, 19 Ky. L. Rep. 548.

*Missouri*.—*MacDonald v. Wagner*, 5 Mo. App. 56.

*New York*.—*Chatfield v. Simonson*, 92 N. Y. 209, *affirming* 10 Daly 295; *Quinn v. Van Pelt*, 36 Super. Ct. 279.

*Tennessee*.—*Cantrell v. Chism*, 5 Sneed 116.

*Rhode Island*.—*Orr v. Tanner*, 12 R. I. 94.

<sup>9</sup> *Henry v. Vance*, 111 Ky. 72, 63 S. W. 273, 23 Ky. L. Rep. 491; *Palms v. Howard*, 129 Ky. 668, 112 S. W. 1110. And see also *supra*, § 155.

<sup>10</sup> *Donaldson v. Eaton*, 136 Ia. 650, 114 N. W. 19, 125 Am. St. Rep. 275, 14 L.R.A.(N.S.) 1168.

<sup>11</sup> *Larey v. Baker*, 86 Ga. 468, 12 S. E. 684; *Olson v. Lamb*, 56 Neb. 104, 76 N. W. 433, 71 Am. St. Rep. 670.

See also *supra*, §§ 395–397, as to the purchase of litigious rights as champertous.

<sup>12</sup> *Davis v. Farwell*, 80 Vt. 166, 67 Atl. 129; *Squier v. Barnes*, 193 Mass. 21, 78 N. E. 731; *Kellogg v. Budlong*, 7 How. (Miss.) 340; *Sackett v. Breen*, 50 Hun 602 mem., 3 N. Y. S. 473; *Deering v. Schreyer*, 27 Misc. 237, 58 N. Y. S. 485, *affirmed* 40 App. Div. 633, 58 N. Y. S. 1139.

<sup>13</sup> See *supra*, §§ 152, 156, 164, 174.

representation of conflicting interests, have been generally considered heretofore.<sup>14</sup>

### § 556. When Fraud or Bad Faith Unavailable as Defense.

— But an attorney's right to compensation is in no way affected by the mere fact that he represents third persons whose interests are not identical with those of his client, providing, of course, that the representation of such interests is not inconsistent with the faithful discharge of his duties, as an attorney at law, to both parties.<sup>15</sup> Nor can the client complain of fraud or bad faith on the part of his attorney where, with full knowledge of the facts, he allows the attorney to act for him without objection, and accepts the benefits of the services rendered in his behalf, or otherwise consents to the attorney's alleged misconduct.<sup>16</sup> So, an attorney will not be precluded from recovering compensation for services rendered, because of subsequent misconduct which does not affect the value of such services to the client,<sup>17</sup> or because of fraud or unfaithfulness in a transaction entirely distinct from that involved in the action for compensation;<sup>18</sup> and it has been held that the attorney may recover for such beneficial services as were rendered by him down to the time he began to act fraudulently, or with bad faith, towards his client.<sup>19</sup> Likewise, the mere fact that an attorney has, under a prior retainer, advocated views of the law and facts different from those upon which his client rests his case, or has officially, as a judge or officer of the government, held a different view of the law and the rights of the parties, will not of itself disqualify him from accepting a retainer, and recovering for his

<sup>14</sup> See *supra*, §§ 152-182.

<sup>15</sup> *Hughes v. Dundee Mort. & Trust Inv. Co.*, 21 Fed. 469; *Peckham v. Ramsey*, 208 Mass. 112, 94 N. E. 290; *Deering v. Schreyer*, 27 Misc. 237, 58 N. Y. S. 485, *affirmed* 40 App. Div. 633, 58 N. Y. S. 1139; *Ellerd v. Randolph*, (Tex.) 138 S. W. 1171. See also *supra*, § 154.

<sup>16</sup> *Mearl v. Gilbert*, 60 S. W. 8, 22 Ky. L. Rep. 1523; *Brodie v. Parsons*, 64 S. W. 426, 23 Ky. L. Rep. 831; *Patterson v. Fleenor*, 89 S. W. 705,

28 Ky. L. Rep. 582; *Niles v. Muzzy*, 33 Mich. 61, 20 Am. Rep. 670; *Gleason v. Kellogg*, 52 Vt. 14.

<sup>17</sup> *Richardson v. Richardson*, 100 Mich. 364, 59 N. W. 178; *In re Miller*, 22 W. N. C. 11, 5 Pa. Co. Ct. 522; *Ellerd v. Randolph*, (Tex.) 138 S. W. 1171.

<sup>18</sup> *Currie v. Cowles*, 6 Bosw. (N. Y.) 452.

<sup>19</sup> *Davis v. Smith*, 48 Vt. 52. See also *Quinn v. Van Pelt*, 36 Super. Ct. (N. Y.) 279.

services.<sup>20</sup> So, an attorney who has been retained to prosecute a criminal action should be guided by his own judgment as to the innocence of the defendant, even though it is contrary to the oath of his client, and may result in the prisoner's discharge; and, in such case, the fact that the attorney does so act will not disentitle him to compensation.<sup>1</sup>

**§ 557. Refusal to Pay over Money Collected.**—It has been quite generally held that an attorney will not be entitled to compensation for the collection of money where he refuses to pay it over to his client within a reasonable time,<sup>2</sup> and this is especially true where the client has been obliged to retain other counsel to recover the sum collected from the original attorney.<sup>3</sup> It has also been held that an attorney who, after making certain collections under a special contract whereby he was to be allowed a certain share for his services, refuses his client's demand for an accounting, cannot claim the benefit of such contract as to money thereafter collected.<sup>4</sup> The attorney's refusal to pay over money collected by him for his client warrants the rescission of the contract of employment;<sup>5</sup> but should the attorney be discharged without cause he will be entitled to reasonable compensation.<sup>6</sup> Nor will an attorney be deprived of his compensation where he rightfully retains the money collected by him, as, for instance, where he has a lien thereon.<sup>7</sup>

<sup>20</sup> *Smith v. Chicago & N. W. R. Co.*, 60 Ia. 515, 15 N. W. 291.

<sup>1</sup> *Rush v. Cavanaugh*, 2 Pa. St. 187.

<sup>2</sup> *Gray v. Conyers*, 70 Ga. 349; *Pal-lace v. Niagara, L. & O. Power Co.*, 131 App. Div. 453, 115 N. Y. S. 340; *Walton v. Dickerson*, 7 Pa. St. 376; *Fisher v. Knox*, 13 Pa. St. 622, 53 Am. Dec. 503; *Wills v. Kane*, 2 Grant Cas. (Pa.) 60. And see *In re Wash-ington*, 82 Kan. 829, 109 Pac. 700.

As to an attorney's liability in the collection of claims generally, see *supra*, §§ 326-330.

<sup>3</sup> *Manning v. Clark*, 40 Fed. 121; *Trapnall's Adm'r v. Byrd's Adm'r*, 22

Ark. 10; *Bredin v. Kingland*, 4 Watts (Pa.) 420; *Large v. Coyle*, (Pa.) 12 Atl. 343.

<sup>4</sup> *McDowell v. Baker*, 29 Ind. 481.

<sup>5</sup> *Manning v. Clark*, 40 Fed. 121.

<sup>6</sup> *Scobey v. Ross*, 5 Ind. 445; *Hern-ndon v. Lammers*, (Tex.) 55 S. W. 414. See also *supra*, §§ 450, 451.

<sup>7</sup> *Georgia*.—*Gray v. Conyers*, 70 Ga. 349.

*Massachusetts*.—*Soper v. Manning*, 147 Mass. 126, 16 N. E. 752.

*Missouri*.—*Dearing v. Fletcher*, 37 Mo. App. 122.

*New York*.—*Ferndon v. Ferndon*, 1 App. Div. 629 mem., 36 N. Y. S. 741.

§ 558. **Abandonment of Cause by Attorney.**—The abandonment by an attorney of his client's cause, or other business entrusted to his care, terminates the relation of attorney and client,<sup>8</sup> and if such abandonment be without cause, it will constitute a good defense to an action by the attorney for his compensation.<sup>9</sup> On the other hand, however, a justifiable abandonment will not preclude an attorney from recovering the reasonable value of the services performed by him down to that time,<sup>10</sup> nor will an attorney's right to compensation be affected by the fact that, with his client's consent, he withdrew from a case in which he had rendered beneficial services.<sup>11</sup> Whether, under the evidence, an abandonment was justified, is a question of fact.<sup>12</sup>

§ 559. **Gratuitous Service.**—It is competent for the defendant, in an action for counsel fees, to set up and prove that the services were rendered gratuitously;<sup>13</sup> and in some instances it has been held that the services of an attorney will be deemed to have been gratuitous, in the absence of an agreement to the contrary; as, for instance, where the attorney is personally interested

*Pennsylvania.*—*Large v. Coyle*, 12 Atl. 343.

*Rhode Island.*—*Burns v. Allen*, 15 R. I. 32, 23 Atl. 35, 2 Am. St. Rep. 844.

*Tennessee.*—*Foster v. Jackson*, 8 Baxt. 433.

*Vermont.*—*Davis v. Farwell*, 80 Vt. 166, 67 Atl. 129.

<sup>8</sup> See *supra*, § 139.

<sup>9</sup> *Houghton v. Clarke*, 80 Cal. 417, 22 Pac. 288; *Holmes v. Evans*, 129 N. Y. 140, 29 N. E. 233, *affirming* 59 Super. Ct. 136, 13 N. Y. S. 614; *Buckley v. Buckley*, 64 Hun 632 mem., 18 N. Y. S. 607; *Bolte v. Fichtner*, 68 Hun 147, 22 N. Y. S. 725; *Cantrell v. Chism*, 5 Sneed (Tenn.) 116.

<sup>10</sup> *Franklin County v. Layman*, 43 Ill. App. 163; *Young v. Lanznar*, 133 Mo. App. 130, 112 S. W. 17; *Tenney*

*v. Berger*, 93 N. Y. 524, 45 Am. Rep. 263. And see also *supra*, § 453.

<sup>11</sup> *Coopwood v. Wallace*, 12 Ala. 790.

<sup>12</sup> *Young v. Lanznar*, 133 Mo. App. 130, 112 S. W. 17; *Pickard v. Pickard*, 83 Hun 338, 31 N. Y. S. 987.

<sup>13</sup> *Kentucky.*—*Lilly v. Pryse*, 54 S. W. 961, 21 Ky. L. Rep. 1223.

*Michigan.*—*Cicotte v. Corporation of Catholic, etc., Church*, 60 Mich. 552, 27 N. W. 682.

*Minnesota.*—*Humphreys v. Jacoby*, 41 Minn. 226, 42 N. W. 1059.

*New York.*—*Brown v. Remington*, 90 Hun 214, 35 N. Y. S. 621.

*Tennessee.*—*Caldwell v. Shields*, 53 S. W. 1094.

*Vermont.*—See *Davis v. Downer*, 10 Vt. 529.

*West Virginia.*—*Dorr v. Camden*, 55 W. Va. 226, 46 S. E. 1014, 65 L.R.A. 348.



in the matter undertaken,<sup>14</sup> or, perhaps, where the services were rendered for a brother lawyer.<sup>15</sup> So, an agreement by an attorney, in advance of the rendition of legal services, not to charge a fee therefor, is binding on his partner, though the latter was ignorant of such agreement;<sup>16</sup> nor can the effect of such an agreement be avoided by a dissolution of the firm.<sup>17</sup> The burden of proving gratuitous service rests with the defendant,<sup>18</sup> and any evidence which tends to prove that fact may be introduced,<sup>19</sup> the weight and sufficiency thereof, and the credibility of the witnesses, being questions of fact for the jury.<sup>20</sup> Ordinarily, of course, when parties consult an attorney and receive his advice, or the benefit of his services, he is entitled to compensation therefor, and it is

<sup>14</sup> *Martin v. Campbell*, 11 Rich. Eq. (S. C.) 205.

<sup>15</sup> *Where Client Is Another Attorney—Custom as to Gratuitous Services.*—In *Graydon v. Stokes*, 24 S. C. 483, the court said: "While there does exist, in certain localities at least, a courtesy among gentlemen of the bar not to charge each other, but, when requested by a brother lawyer, to render him services in the line of their profession without fee or reward, yet, where such courtesy exists, it does not touch the legal rights of the parties. The very fact that it is called a 'courtesy' indicates that making no charge is exceptional, and that the general rule is to charge. Besides, even where such courtesy is generally practiced, we have no doubt that there are certain well-grounded exceptions to the rule; and certainly the moment the parties, from any cause whatever, stand upon their rights, there can be no such thing as courtesy in the case."

<sup>16</sup> *Stone v. Hart*, 66 S. W. 191, 23 Ky. L. Rep. 1777.

*Compare* *Waples v. Layton*, 24 La. Ann. 624, wherein it appeared that an

attorney employed by the year, at a fixed salary, to attend to the regular business of a bank, agreed with the bank that during his absence a firm of which he was a member would attend to its business free of charge, and it was held that such agreement did not bind the firm.

<sup>17</sup> *Knight v. Whitmore*, 125 Cal. 198, 57 Pac. 891.

<sup>18</sup> *Woodbury v. Conger*, 61 Hun 624 mem., 15 N. Y. S. 926; *Kelly v. Houghton*, 59 Wis. 400, 18 N. W. 326.

<sup>19</sup> *Frost v. Lawrence*, 138 App. Div. 105, 122 N. Y. S. 913; *Briggs v. Georgia*, 15 Vt. 61.

*Evidence of the customary and usual charges* for services of a similar character, is incompetent to rebut a claim that the services in question were rendered gratuitously. *Kelly v. Houghton*, 59 Wis. 400, 18 N. W. 326.

<sup>20</sup> *McFadden v. Ferris*, 6 Ind. App. 454, 32 N. E. 107; *Hatfield v. Chenoweth*, 24 Ind. App. 343, 56 N. E. 51; *Lilly v. Pryse*, 54 S. W. 961, 21 Ky. L. Rep. 1223; *Dillon v. McManus*, 121 Mo. App. 37, 97 S. W. 971; *Frost v. Lawrence*, 138 App. Div. 105, 122 N. Y. S. 913.

immaterial whether they expected to pay him or not.<sup>1</sup> Nor will an attorney be estopped from demanding compensation because of a statement, made by him under a mistake of fact, that he intended to perform certain services without pay.<sup>2</sup> So, a purpose to render gratuitous services will not be inferred from the mere fact that the attorney was a stockholder in a corporation for which the services were performed,<sup>3</sup> or from the fact that he was a director therein,<sup>4</sup> or that he was the trustee of a church in whose behalf, at the instance of his cotrustees, he had rendered services.<sup>5</sup> Nor is the fact that legal work was given to an attorney because he "needed the practice," inconsistent with an intention to pay therefor.<sup>6</sup>

§ 560. **Payment.** — It is also competent to prove, as a defense to an action for counsel fees, that the claim sued upon has been paid,<sup>7</sup> or that there has been an accord and satisfaction thereof,<sup>8</sup> or that its payment has been provided for by a decree of court.<sup>9</sup> So, the acceptance of a sum of money by an attorney who knew, or had the means of knowing, that it was tendered in full payment for his services, is equivalent to an acceptance of the terms under

<sup>1</sup> *Morrison v. Flournoy*, 23 La. Ann. 593; *Tiffany v. Morgan*, (R. I.) 73 Atl. 465.

<sup>2</sup> *Pickett v. Gore*, (Tenn.) 58 S. W. 402.

<sup>3</sup> *Barker v. Cairo & Fulton R. Co.*, 3 Thomp. & C. (N. Y.) 328.

<sup>4</sup> *Christie v. Sawyer*, 44 N. H. 298.

<sup>5</sup> *Cicotte v. Corporation of Catholic, etc., Church*, 60 Mich. 552, 27 N. W. 682.

<sup>6</sup> *Tiffany v. Morgan*, (R. I.) 73 Atl. 465.

<sup>7</sup> *United States*.—*Tull v. Nash*, 141 Fed. 557, 73 C. C. A. 29.

*California*.—*Sprigg v. Barber*, 122 Cal. 573, 55 Pac. 419.

*Georgia*.—*Bull v. St. Johns*, 39 Ga. 78.

*Iowa*.—*Dunham v. Bentley*, 103 Ia. 136, 72 N. W. 437.

*Massachusetts*.—*Blair v. Columbian Fireproofing Co.*, 191 Mass. 333, 77 N. E. 762.

*Michigan*.—*Baldwin v. Clock*, 68 Mich. 201, 35 N. W. 904.

*Minnesota*.—*Olson v. Gjertsen*, 42 Minn. 407, 44 N. W. 306.

*Missouri*.—*Trimble v. Kansas City, P. & G. R. Co.*, 180 Mo. 574, 1 Ann. Cas. 363, 79 S. W. 678.

*New York*.—*Turnbull v. Ross*, 5 Daly 130; *Laroe v. Sugar Loaf Dairy Co.*, 87 App. Div. 585, 84 N. Y. S. 609.

*Tennessee*.—*Vaughn v. Tealey*, 63 S. W. 236.

*Wisconsin*.—*Smith v. Norton*, 114 Wis. 458, 90 N. W. 419.

<sup>8</sup> *Carter v. Chicago, B. & Q. R. Co.*, 136 Mo. App. 719, 119 S. W. 35.

<sup>9</sup> *Connor v. Ashley*, 41 S. C. 67, 19 S. E. 201.

which the tender was made, and, under such circumstances, no further sum can be recovered; <sup>10</sup> and it has been so held where, under an order of court, a certain sum of money was ordered to be paid to an attorney as compensation in full for his services, even though the acceptance of such sum was under protest as to its sufficiency. <sup>11</sup> But the retention for a few days, of a check given as payment in full, until the attorney could look into the matter, is not sufficient evidence of payment to bar an action for the recovery of a larger sum. <sup>12</sup> So, also, a receipt given by the attorney may be so explained, or rebutted, as to nullify its effect as evidence of payment. <sup>13</sup>

The defense of payment is an affirmative one, and, consequently, must be established by the defendant. <sup>14</sup> The payment of an attorney for services rendered for a receiver, is no defense to an action for compensation for such services as were rendered in behalf of the company, for whom the receiver was appointed, prior to such appointment; <sup>15</sup> so, a payment made to an attorney by one of several colitigants will be presumed to have been made in settlement of his individual liability. <sup>16</sup>

<sup>10</sup> *Walker v. O'Neill Mfg. Co.*, 128 Ga. 831, 58 S. E. 475; *Laroe v. Sugar Loaf Dairy Co.*, 87 App. Div. 585, 84 N. Y. S. 609.

<sup>11</sup> *Dunham v. Bentley*, 103 Ia. 136, 72 N. W. 437.

<sup>12</sup> *Cain v. Moore*, 54 Wash. 627, 103 Pac. 1130.

<sup>13</sup> *Indiana*.—*Kepler v. Jessup*, 11 Ind. App. 241, 37 N. E. 655.

*Iowa*.—*Ellis v. Warfield*, 82 Ia. 659, 48 N. W. 1058.

*Massachusetts*.—*Blair v. Columbian Fireproofing Co.*, 193 Mass. 540, 79 N. E. 779.

*Nebraska*.—*Cathers v. Linton*, 75 Neb. 420, 106 N. W. 468.

*Texas*.—*Morris v. Kesterson*, 88 S. W. 277.

<sup>14</sup> *Indiana*.—*Fleming v. Flagg*, 8 Ind. 363.

*Maine*.—*Hooper v. Brundage*, 22 Me. 460.

*Michigan*.—*Baldwin v. Clock*, 68 Mich. 201, 35 N. W. 904; *Hitchcock v. Davis*, 87 Mich. 629, 49 N. W. 912; *Howell v. Smith*, 108 Mich. 350, 66 N. W. 218.

*New Jersey*.—*Koenig v. Harned*, 13 Atl. 236.

*New York*.—*In re Borkstrom*, 63 App. Div. 7, 71 N. Y. S. 451, *affirmed* 168 N. Y. 639, 61 N. E. 1127; *Easton v. Smith*, 1 E. D. Smith 318.

*Texas*.—*Herdon v. Lammers*, 55 S. W. 414.

*Washington*.—*Steel v. Gordon*, 14 Wash. 521, 45 Pac. 151.

<sup>15</sup> *Trimble v. Kansas City, P. & G. R. Co.*, 180 Mo. 574, 1 Ann. Cas. 363, 79 S. W. 678.

<sup>16</sup> *Fleming v. Flagg*, 8 Ind. 363.

§ 561. **Payment of Fees to Other Counsel.** — The fact that a client has retained several attorneys, or has become responsible for the fees of associate or assistant counsel, is not, as a general rule, an available defense to an action for compensation brought by either of such attorneys, in the absence of an agreement to that effect.<sup>17</sup> And where the original attorney has, himself, employed associate counsel, a release or waiver of the latter's claim, as against the client, is not a prerequisite to a recovery by the original attorney.<sup>18</sup> Nor will an attorney who sues for compensation be limited to the amount paid by him to an assistant attorney for doing the work.<sup>19</sup> So, associate or additional counsel, retained by the client, will not be affected by a contract for compensation between the client and the original attorney,<sup>20</sup> and this is especially true where the associate counsel was not informed as to such contract.<sup>1</sup> But where several attorneys are employed for a joint fee, payment thereof to one of them releases the client, who has no interest in the matter of division among them and is not bound by their agreements in that regard.<sup>2</sup>

**17 England.**—In re Metropolitan Coal Consumers' Ass'n, 45 Ch. D. 606.

**California.**—Lugo v. De Toro, 91 Cal. 405, 18 Pac. 866, 27 Pac. 1082.

**Florida.**—Randall v. Archer, 5 Fla. 438.

**Illinois.**—Hutchinson v. Dunham, 41 Ill. App. 107.

**Kentucky.**—Lipscomb's Adm'r v. Castleman, 147 Ky. 741, 145 S. W. 753; Townsend v. Rhea, 38 S. W. 865, 18 Ky. L. Rep. 901; Nevin v. Masonic Sav. Bank's Assignee, 52 S. W. 811, 21 Ky. L. Rep. 596.

**Louisiana.**—Morel v. New Orleans, 12 La. Ann. 485.

**Minnesota.**—Moyer v. Cantiency, 41 Minn. 242, 42 N. W. 1060.

**Missouri.**—Wright v. Gillespie, 43 Mo. App. 244; Kingsbury v. Joseph, 94 Mo. App. 298, 68 S. W. 93.

**Nebraska.**—Cowles v. Thompson, 31 Neb. 479, 48 N. W. 145.

**New York.**—In re Hynes, 105 N. Y. 560, 12 N. E. 60; In re Simpson, 53 Hun 629 mem., 5 N. Y. S. 863. See also Allison v. Scheeper, 9 Daly 365.

**Texas.**—Raley v. Smith, 73 S. W. 54.

**Washington.**—Isham v. Parker, 3 Wash. 755, 29 Pac. 835.

**18** In re Hynes, 105 N. Y. 560, 12 N. E. 60.

**19** Hyde v. Moxie Nerve-Food Co., 160 Mass. 559, 36 N. E. 585.

**20** Allen v. Parish, 65 Kan. 496, 70 Pac. 351.

**1** Miller v. Ballerino, 135 Cal. 566, 67 Pac. 1046, 68 Pac. 600; Manning v. Borland, 83 Me. 125, 21 Atl. 837.

**2** Schiefer v. Freygang, 141 App. Div. 236, 125 N. Y. S. 1037.

§ 562. **Solicitation of Business.**—It would seem that, in some cases at least, it may be shown in defense of an action for compensation, that the case was solicited by the plaintiff.<sup>3</sup>

<sup>3</sup> See *Roche v. Baldwin*, 143 Cal. 186, 76 Pac. 956; *Ingersoll v. Coal Creek Coal Co.*, 117 Tenn. 263, 10 Ann. Cas. 829, 98 S. W. 178, 119 Am. St. Rep. 1003, 9 L.R.A. (N.S.) 282.

In a recent case, dealing with this subject, the court said: "We cannot agree that in these latter years a spirit of commercialism has lowered the standard of the legal profession. We cannot agree that the practice of law has become a 'business,' instead of a 'profession,' and that it is now allowable to resort to the practices and devices of business men to bring in business by personal solicitation, under the facts shown in this case. As to how far an attorney may go in soliciting business, or whether he may solicit at all, we are not called upon to decide; but when such a case is presented, as is disclosed in this record, of attorneys rushing to the scene of disaster in hot haste, and competing with each other in soliciting the bereaved ones to allow them to sue for their losses, we feel that we are called upon to say in no uncertain terms that such conduct is an act of impropriety and inconsistent with the character of the profession. We cannot, we dare not, lower the standard of the legal profession to that of a mere business, in which fleetness of foot, or the celerity of the automobile, determines who shall be employed. The miserable victims of the disaster are dazed by the terrible bereavement. They are in no condition to consider their rights to damages. In their extremity, they fly to

any one promising relief, when, if left to time and more mature consideration, they would be enabled to make, perhaps, a better choice. In addition, it is unbecoming a member of the profession, and a public scandal, and when he bases his right to recover fees upon such improper conduct, and lowering the character of the profession and the court, it is no excuse that other attorneys do the same; but this is rather a reason why this court should act promptly and decidedly, in order that an end may be put to the practice. It is no excuse that corporations which have caused such disasters have been alert to send their agents and representatives to the scene, with a view of forestalling suits and making favorable compromises. This court has never failed to condemn this practice in the strongest terms; and, whenever a case has come before it which in any way smacked of fraud or undue advantage arising out of such conduct, this court has not been slow to disregard or set aside improper or hard settlements. But such agents of corporations are not, as a rule, officers of the court, nor do they occupy that high status which the law places the attorney upon; and we think that we can safely say that if any attorney should make such settlement, under such circumstances, this court would not hesitate to disbar him. It is said that there is no precedent for refusing fees because of such conduct. If this be so, we are admonished by the record in this case that it is high time that such a pre-

§ 563. **Statute of Limitations Generally.**—The statute of limitations may also be set up in bar of a recovery;<sup>4</sup> and, as a general rule, will commence to run against the attorney from the time his services are so completed that he might have brought an action for his compensation.<sup>5</sup> But where several suits arise out of the same subject-matter, so that the entire litigation must be considered as one continuous transaction, and based upon one contract of employment, the statute begins to run only from the ter-

edent be set, and in such terms as may not be mistaken or misunderstood." *Ingersoll v. Coal Creek Coal Co.*, 117 Tenn. 263, 10 Ann. Cas. 829, 98 S. W. 178, 119 Am. St. Rep. 1003, 9 L.R.A. (N.S.) 282.

<sup>4</sup> *Dempsey v. Wells*, 109 Mo. App. 470, 84 S. W. 1015.

<sup>5</sup> *England*.—*Martindale v. Falkner*, 2 C. B. 706, 52 E. C. L. 706, 3 Dowl. & L. 600, 10 Jur. 161; *Harris v. Osbourn*, 2 Crompt. & M. 629, 3 L. J. Exch. 182, 4 Tyrw. 445; *Whitehead v. Lord*, 7 Exch. 691, 21 L. J. Exch. 239; *Harris v. Quine*, L. R. 4 Q. B. 653; *Coburn v. Colledge*, [1897] 1 Q. B. 702, 66 L. J. Q. B. 462. See also *Rothery v. Munnings*, 1 B. & Ad. 15, 20 E. C. L. 334, 8 L. J. K. B. 386. Compare *Phillips v. Broadley*, 11 Jur. 264.

*Canada*.—*Gourley v. McAloney*, 29 Nova Scotia 319; *Millar v. Kanady*, 5 Ont. L. Rep. 412. See also *Halliwel v. Zwick*, 13 Ont. W. Rep. 1; *Gilman v. Cockshutt*, 18 Quebec Super. Ct. 552; *Lizars v. Dawson*, 32 U. C. Q. B. 237.

*Arkansas*.—*Phelps v. Patterson*, 25 Ark. 185; *McNeil v. Garland*, 27 Ark. 343; *Parker v. Carter*, 91 Ark. 162, 120 S. W. 836, 134 Am. St. Rep. 60; *Boynton v. Brown*, 103 Ark. 513, 145 S. W. 242. See also *Fenno v. English*, 22 Ark. 170.

*California*.—*Hancock v. Pico*, 47 Cal. 161; *Bartlett v. Odd Fellows' Sav. Bank*, 79 Cal. 218, 21 Pac. 743, 12 Am. St. Rep. 139; *Johnson v. Bank of Lake*, 125 Cal. 6, 57 Pac. 664, 73 Am. St. Rep. 17; *Osborn v. Hopkins*, 160 Cal. 501, Ann. Cas. 1913A 413, 117 Pac. 519.

*Illinois*.—*Walker v. Goodrich*, 16 Ill. 341. See also *Meyer v. McCumber*, 75 Ill. App. 119.

*Indiana*.—*Felt v. Mitchell*, 44 Ind. App. 96, 88 N. E. 723.

*Kentucky*.—*Warren Deposit Bank v. Barelay*, 60 S. W. 853, 22 Ky. L. Rep. 1555.

*Louisiana*.—*Looney v. Levy*, 35 La. Ann. 1012.

*Massachusetts*.—*Eliot v. Lawton*, 7 Allen 274, 83 Am. Dec. 683; *Taft v. Shaw*, 159 Mass. 592, 35 N. E. 88.

*Michigan*.—*Walbridge v. Barrett*, 118 Mich. 433, 76 N. W. 973, 5 Detroit Leg. N. 562.

*Mississippi*.—*Johnson v. Pyles*, 11 Smedes & M. 189.

*Missouri*.—See *Harrison v. Hall*, 8 Mo. App. 167.

*Nebraska*.—See *Greek v. McDaniel*, 68 Neb. 569, 94 N. W. 518.

*New Jersey*.—See *Holloway v. Appelget*, 55 N. J. Eq. 583, 40 Atl. 27, 62 Am. St. Rep. 827.

*New York*.—*Bruyn v. Comstock*, 56 Barb. 9; *Mygatt v. Wilcox*, 45 N. Y.

mination of the last suit.<sup>6</sup> Where an attorney is employed to conduct litigation, his employment will be deemed to continue until final judgment has been entered,<sup>7</sup> unless the relationship of attorney and client has been sooner terminated.<sup>8</sup> So, where the attorney's compensation is dependent on a contingency, the running of the statute must date from the happening thereof.<sup>9</sup>

**§ 564. Where Professional Relationship Has Been Prematurely Terminated.**—In some instances the relationship of attorney and client terminates before the completion of the business undertaken by the attorney,<sup>10</sup> and when so terminated the attorney's right of action for compensation, if he has any,<sup>11</sup> accrues.<sup>12</sup> But where the premature termination of the relation

306, 6 Am. Rep. 90, *affirming* 1 Lans. 55; *Bathgate v. Haskin*, 59 N. Y. 533; *Gustine v. Stoddard*, 23 Hun 99; *Reavey v. Clark*, 56 Hun 641 mem., 18 Civ. Proc. 272, 9 N. Y. S. 216; *Wells v. Salina*, 71 Hun 559, 25 N. Y. S. 134; *Dailey v. Devlin*, 21 App. Div. 62, 47 N. Y. S. 296; *Matter of Stewart*, 21 Misc. 412, 47 N. Y. S. 1065; *Clarkson v. Young*, 11 N. Y. S. 562; *McCrea v. Scofield*, 86 N. Y. S. 10.

*Pennsylvania*.—*Foster v. Jack*, 4 Watts 334; *Hale v. Ard*, 48 Pa. St. 22; *Lichty v. Hugus*, 55 Pa. St. 434; *Mosgrove v. Golden*, 101 Pa. St. 605; *Campbell v. Maple*, 105 Pa. St. 304; *Mattern v. McDivitt*, 113 Pa. St. 402, 6 Atl. 83; *Tarr's Estate*, 21 Pa. Co. Ct. 358.

*Texas*.—*Gulf, C. & S. F. R. Co. v. Hutcheson*, 3 Willson Civ. Cas. Ct. App. § 96; *Jones v. Lewis*, 11 Tex. 359; *Montgomery v. Brown*, 31 S. W. 1084; *Leake v. Cleburne*, 36 S. W. 97.

*Vermont*.—*Langdon v. Castleton*, 30 Vt. 285; *Adams v. Mott*, 44 Vt. 259; *Davis v. Smith*, 48 Vt. 52; *Noble v. Bellows*, 53 Vt. 527.

<sup>6</sup> *Meyer v. McCumber*, 75 Ill. App. 119.

<sup>7</sup> *Arkansas*.—*Fenno v. English*, 22 Ark. 170.

*Illinois*.—*Walker v. Goodrich*, 16 Ill. 341.

*Massachusetts*.—*Eliot v. Lawton*, 7 Allen 274, 83 Am. Dec. 683.

*Mississippi*.—*Johnson v. Pyles*, 11 Smedes & M. 189. See also *Boylan v. Holt*, 45 Miss. 277.

*New York*.—*Bruyn v. Comstock*, 56 Barb. 9; *Gustine v. Stoddard*, 23 Hun 99; *Clarkson v. Young*, 11 N. Y. S. 562.

<sup>8</sup> *Eliot v. Lawton*, 7 Allen (Mass.) 274, 83 Am. Dec. 683; *Foster v. Jack*, 4 Watts (Pa.) 334; *Lichty v. Hugus*, 55 Pa. St. 434. And see the following section.

<sup>9</sup> *Bartlett v. Odd Fellows' Sav. Bank*, 79 Cal. 218, 21 Pac. 743, 12 Am. St. Rep. 139; *Morgan v. Brown*, 12 La. Ann. 159.

<sup>10</sup> See *supra*, §§ 137-141.

<sup>11</sup> See *supra*, §§ 450-460, as to the recovery of compensation on the premature termination of an attorney's employment.

<sup>12</sup> *Weil v. Finneran*, 70 Ark. 509, 69 S. W. 310; *Watson v. Columbia Min. Co.*, 118 Ga. 603, 45 S. E. 460; *Belden*

of attorney and client results because of a settlement by the client,<sup>13</sup> the statute will not begin to run against the attorney until he learns, or has reason to know, of such settlement.<sup>14</sup>

*Submitting Case to Jury — Recovery — Review.*

§ 565. **Submitting Case to Jury.** — At the conclusion of the trial the case should be submitted to the jury with proper instructions based upon the law and the evidence as applied to the issues involved.<sup>15</sup> Thus, where there is a conflict of evidence, the jury should be properly instructed as to questions of employment,<sup>16</sup>

*r. Butchers' Union Slaughterhouse Co.*, 38 La. Ann. 392; *Campbell v. Maple's Adm'r.* 105 Pa. St. 304.

<sup>13</sup> See *supra*, §§ 456-460.

<sup>14</sup> *Holloway v. Appelget.* 55 N. J. Eq. 583, 40 Atl. 27, 62 Am. St. Rep. 827; *Liehty v. Hugus.* 55 Pa. St. 434; *Henrietta Nat. Bank v. Barrett*, (Tex.) 25 S. W. 456.

<sup>15</sup> *United States. — Sanders v. Graves.* 105 Fed. 849, *affirmed* 125 Fed. 690, 60 C. C. A. 422.

*Alabama.*—*Moore v. Watts.* 81 Ala. 261, 2 So. 278.

*California.*—*Ellis v. Woodburn.* 24 Pac. 893.

*Illinois.*—*Bennett v. Connelly.* 103 Ill. 50; *Gorrell v. Payson.* 170 Ill. 213, 48 N. E. 433, *reversing* 68 Ill. App. 641; *Goodman v. Lee.* 40 Ill. App. 229.

*Indiana.*—*Hauss v. Niblack.* 80 Ind. 407; *Union Mut. Life Ins. Co. v. Buchanan.* 100 Ind. 63.

*Maine.*—*Matthews v. Williams Mfg. Co.* 98 Me. 234, 56 Atl. 759.

*Massachusetts.*—*Cooke v. Plaisted.* 176 Mass. 374, 57 N. E. 687.

*Missouri.*—*Rose v. Spies.* 44 Mo. 20; *Thrasher v. Greene County.* 105 Mo. 214, 16 S. W. 955; *Dearing v. Fletcher.* 37 Mo. App. 122.

*Ohio.*—*Scheinesohn v. Lemonek.* 84 Ohio St. 424, Ann. Cas. 1912C 737, 95 N. E. 913.

*Oregon.*—*MacMahon v. Duffy.* 36 Ore. 150, 59 Pac. 184.

*South Dakota.*—*Cranmer v. Brothers.* 15 S. D. 234, 88 N. W. 105.

*Texas.*—*Herndon v. Lammers.* 55 S. W. 414.

*Wisconsin.*—*Gough v. Root.* 73 Wis. 32, 40 N. W. 647, 41 N. W. 622.

<sup>16</sup> *United States.*—*Northern Pac. R. Co. v. Clarke.* 106 Fed. 794, 45 C. C. A. 635.

*Alabama.*—*Irvin v. Strother.* 163 Ala. 484, 50 So. 969.

*California.*—*Miner v. Rickey.* 5 Cal. App. 451, 90 Pac. 718.

*Connecticut.*—*Graves v. Lockwood.* 30 Conn. 276.

*Indiana.*—*Hauss v. Niblack.* 80 Ind. 407.

*Iowa.*—*Cullison v. Lindsay.* 108 Ia. 124, 78 N. W. 847.

*Missouri.*—*Warder v. Seitz.* 157 Mo. 140, 57 S. W. 537; *Stewart v. Emerson.* 70 Mo. App. 482; *Dempsey v. Wells.* 109 Mo. App. 470, 84 S. W. 1015; *Clay v. Brown.* 148 Mo. App. 541, 128 S. W. 803.

*New York.*—*Richards v. Washburn.* 14 App. Div. 237, 43 N. Y. S. 615.



fairness,<sup>17</sup> performance,<sup>18</sup> the acceptance of beneficial services,<sup>19</sup> the value of the services rendered,<sup>20</sup> and the sufficiency of the defense presented.<sup>1</sup> In all such matters the weight of the evidence and the credibility of the witnesses are questions of fact and, therefore, within the exclusive province of the jury.<sup>2</sup> The verdict, as to matters of form, must comply with the local practice.<sup>3</sup>

**§ 566. Recovery Generally.** — As a general rule, the plaintiff will be entitled to recover the amount of compensation stipulated

*Vermont.*—Briggs v. Georgia, 10 Vt. 68.

As to evidence of employment, see *supra*, §§ 507-522.

<sup>17</sup> Muller v. Kelly, 125 Fed. 212, 60 C. C. A. 170, *reversing* 116 Fed. 545.

As to fairness generally, see *supra*, §§ 428-432.

*Compare* Werner v. Knowlton, 107 App. Div. 158, 94 N. Y. S. 1054, wherein it was said that under the express provision of the New York code to the effect that the compensation of an attorney is governed by agreement, express or implied, which is not restrained by law, an attorney expressly fixing the rate of compensation with a client is not compelled, in the absence of evidence of fraud or overreaching, to submit the validity of the agreement to a jury.

<sup>18</sup> Davis v. Jackson, 86 Ga. 138, 12 S. E. 299; Lockwood v. Brush, 6 Dana (Ky.) 433; Peacock v. Ratliff, 62 Wash. 653, 114 Pac. 507.

As to evidence of performance, see *supra*, §§ 523-528.

<sup>19</sup> Hauss v. Niblack, 80 Ind. 407; Hudspeth v. Yetzer, 78 Ia. 11, 42 N. W. 529; Perry v. Bailey, 12 Kan. 539.

As to what constitutes an acceptance. *Attys. at L.* Vol. II.—61.

ance of beneficial services, see *supra*, §§ 518, 519.

<sup>20</sup> See the following section, and see also *supra*, §§ 529-544, 550.

<sup>1</sup> Lindsay v. Carpenter, 90 Ia. 529, 58 N. W. 900; Cullison v. Lindsay, 108 Ia. 124, 78 N. W. 847; Morehead's Trustee v. Anderson, 125 Ky. 77, 100 S. W. 340, 30 Ky. L. Rep. 1137.

As to defenses generally, see *supra*, §§ 551-564.

<sup>2</sup> *United States.*—Gilmore v. McBride, 156 Fed. 464, 84 C. C. A. 274.

*California.*—Buck v. Eureka, 124 Cal. 61, 56 Pac. 612.

*District of Columbia.*—Blankenship v. Cowling, 31 App. Cas. 626.

*Florida.*—Broward v. Doggett, 2 Fla. 49.

*Illinois.*—Artz v. Robertson, 50 Ill. App. 27; Sexton v. Bradley, 110 Ill. App. 495.

*Indiana.*—Blizzard v. Applegate, 77 Ind. 516.

*Maine.*—Matthews v. Williams Mfg. Co., 98 Me. 234, 56 Atl. 759.

*Missouri.*—Ottofy v. Winsor, 137 Mo. App. 272, 119 S. W. 40. See also *supra*, § 506.

<sup>3</sup> Shuck v. Pfennighausen, 101 Mo. App. 697, 74 S. W. 381.

for in an express contract between himself and his client, providing that such amount has not been reduced by set-off or counterclaim.<sup>4</sup> Where, however, the amount of compensation has not been fixed by the parties, the value of attorney's services usually presents a question of fact for the jury,<sup>5</sup> and this is true even though expert testimony has been introduced for the purpose of establishing this fact,<sup>6</sup> although, in some cases, it has been held that the uncontradicted testimony of expert witnesses as to the value of an attorney's services, is binding on the jury.<sup>7</sup>

§ 567. **Recovery of Interest.**—An attorney ordinarily will be entitled to recover interest on the amount due for professional services after a demand therefor has been made on the

<sup>4</sup> *Myers v. Bender*, 46 Mont. 497, 129 Pac. 330; *Allen v. Flynn*, 52 Misc. 121, 101 N. Y. S. 747; *Taggart v. Hower*, (Pa.) 17 Atl. 13; *Clarke v. Faver*, (Tex.) 40 S. W. 1009.

<sup>5</sup> *Arizona*.—*De Mund Lumber Co. v. Stilwell*, 8 Ariz. 1, 68 Pac. 543.

*Arkansas*.—*Weil v. Fineran*, 78 Ark. 87, 93 S. W. 568.

*Colorado*.—*Leitensdorfer v. King*, 7 Colo. 436, 4 Pac. 37.

*Iowa*.—*Graham v. Dillon*, 144 Ia. 82, 121 N. W. 47.

*Kentucky*.—*Morehead's Trustee v. Anderson*, 125 Ky. 77, 100 S. W. 340, 30 Ky. L. Rep. 1137; *Asher v. Metcalf*, 152 Ky. 632, 153 S. W. 987.

*Massachusetts*.—*Cooke v. Plaisted*, 176 Mass. 374, 57 N. E. 687; *Childs v. Littlefield*, 206 Mass. 113, 91 N. E. 1017.

*Michigan*.—*Baldwin v. Clock*, 68 Mich. 201, 35 N. W. 904.

*Minnesota*.—*Wilkinson v. Crookston*, 75 Minn. 184, 77 N. W. 797; *Calhoun v. Akeley*, 82 Minn. 351, 85 N. W. 170.

*Missouri*.—*Musser v. Adler*, 86 Mo. 445; *Warder v. Seitz*, 157 Mo. 140, 57 S. W. 537.

*New York*.—*Randall v. Packard*, 142 N. Y. 47, 36 N. E. 823, *affirming* 1 Misc. 344, 20 N. Y. S. 716; *Serat v. Smith*, 61 Hun 36, 15 N. Y. S. 330; *Steele v. Hammond*, 136 App. Div. 667, 121 N. Y. S. 589.

*Pennsylvania*.—*In re Porter Tp. Road*, 1 Walk. 10; *Playford v. Hutchinson*, 135 Pa. St. 426, 19 Atl. 1019.

*South Carolina*.—*Graydon v. Stokes*, 24 S. C. 483.

*Texas*.—*International & G. N. R. Co. v. Clark*, 81 Tex. 48, 16 S. W. 631; *Britt v. Burghart*, 16 Tex. Civ. App. 78, 41 S. W. 389; *Railey v. Davis*, 128 S. W. 434.

*Vermont*.—*Strong v. McConnel*, 5 Vt. 338.

*Wisconsin*.—*Cunning v. Kemp*, 22 Wis. 509.

<sup>6</sup> See *supra*, § 550.

<sup>7</sup> See *supra*, § 550 note.

client,<sup>8</sup> but not before.<sup>9</sup> The commencement of a suit for the recovery of compensation is, in itself, a sufficient demand.<sup>10</sup> But a demand for payment would seem to be unnecessary where an attorney has been discharged,<sup>11</sup> or where the client compromises the claim without the knowledge or consent of the attorney.<sup>12</sup> So, interest will be allowed on an award,<sup>13</sup> or a judgment, for counsel fees.<sup>14</sup> It has been held, however, that interest may be recovered from the time a claim for services becomes due,<sup>15</sup> and, as to disbursements, from the time they are made.<sup>16</sup> Where an attorney's lien on a judgment is in the form of an open account till allowed, the allowance or nonallowance of interest is discretionary with the court.<sup>17</sup> Under an Illinois statute, an attorney is not entitled to interest unless payment has been withheld "by an unreasonable and vexatious delay of payment," and whether this exists is a question of fact for the jury.<sup>18</sup>

<sup>8</sup> *Colorado*.—Mulligan *v.* Smith, 32 Colo. 404, 76 Pac. 1063; *practically overruling* Colorado Coal & Iron Co. *v.* John, 5 Colo. App. 213, 38 Pac. 399.

*Missouri*.—Trimble *v.* Kansas City, P. & G. R. Co., 180 Mo. 574, 1 Ann. Cas. 363, 79 S. W. 678.

*New York*.—Mygatt *v.* Wileox, 45 N. Y. 306, 6 Am. Rep. 90; Gallup *v.* Perue, 10 Hun 525; Hadley *v.* Ayres, 12 Abb. Pr. N. S. 240; Rexford *v.* Comstock, 3 N. Y. S. 876.

*Wisconsin*.—Remington *v.* Eastern R. Co., 109 Wis. 154, 84 N. W. 898, 85 N. W. 321.

<sup>9</sup> Gallup *v.* Perue, 10 Hun (N. Y.) 525; Hadley *v.* Ayres, 12 Abb. Pr. N. S. (N. Y.) 240; Mygatt *v.* Willeox, 1 Lans. (N. Y.) 55.

<sup>10</sup> Mulligan *v.* Smith, 32 Colo. 404, 76 Pac. 1063.

<sup>11</sup> *Where an attorney has been discharged without cause*, he is entitled to be paid at once for the services rendered down to that time; and, in default of payment, interest accrues from that date as a legal incident.

Goodin *v.* Hays, 88 S. W. 1101, 28 Ky. L. Rep. 112; Com. *v.* Terry, 11 Pa. Super. Ct. 547.

<sup>12</sup> *Where a client compromises a suit* without the knowledge of his attorney, interest on the sum due the attorney will be allowed from the date of such compromise. Boyd *v.* G. W. Chase & Son Mercantile Co., 135 Mo. App. 115, 115 S. W. 1052.

<sup>13</sup> Whitney *v.* New Orleans, 54 Fed. 614, 13 U. S. App. 229, 4 C. C. A. 521.

<sup>14</sup> Louisville Gas Co. *v.* Hargis, (Ky.) 33 S. W. 946.

<sup>15</sup> Adams *v.* Ft. Plain Bank, 36 N. Y. 255. And see Myers *v.* Bender, 46 Mont. 497, 129 Pac. 330.

<sup>16</sup> Rexford *v.* Comstock, 3 N. Y. S. 876.

<sup>17</sup> *Where an attorney's lien on a judgment* is in the form of an open account till allowed, the allowance or nonallowance of interest is discretionary with the court. Gaylord *v.* Nelson, 7 Ky. L. Rep. 821.

<sup>18</sup> Levinson *v.* Sands, 74 Ill. App. 273.

§ 568. **Review.**—The judgment in an action for compensation will usually be reversed only for manifest error in the admission or exclusion of evidence,<sup>19</sup> or in the giving or withholding of instructions,<sup>20</sup> or in some other respect,<sup>1</sup> or where the evidence is insufficient to sustain the verdict.<sup>2</sup> The judgment will not be reversed for harmless error;<sup>3</sup> and, in most jurisdictions, an excessive verdict may be reduced in the appellate court.<sup>4</sup> So,

<sup>19</sup> *Miner v. Rickey*, 5 Cal. App. 451, 90 Pac. 718; *Gilbert v. Fay*, 4 App. Cas. (D. C.) 38; *Dodds v. Gregson*, 35 Wash. 402, 77 Pac. 791.

<sup>20</sup> *Georgia*.—*Wells v. Haynes*, 101 Ga. 841, 28 S. E. 968.

*Missouri*.—*Warder v. Seitz*, 157 Mo. 140, 57 S. W. 537; *Dearing v. Fletcher*, 37 Mo. App. 122; *Stewart v. Emerson*, 70 Mo. App. 482.

*South Dakota*.—*Cranmer v. Brothers*, 15 S. D. 234, 88 N. W. 105.

*Texas*.—*Herndon v. Lammers*, 55 S. W. 414. And see also *supra*, § 565.

<sup>1</sup> *United States*.—*Whitney v. New Orleans*, 54 Fed. 614, 13 U. S. App. 229, 4 C. C. A. 521; *Farmers' Loan & Trust Co. v. McClure*, 78 Fed. 209, 49 U. S. App. 43, 24 C. C. A. 64; *Barcus v. Sherwood*, 136 Fed. 184, 69 C. C. A. 200, *affirming* 130 Fed. 364.

*Arkansas*.—*Wilson v. Fowler*, 3 Ark. 463.

*California*.—*Roche v. Baldwin*, 143 Cal. 186, 76 Pac. 956.

*Colorado*.—*Fillmore v. Wells*, 10 Colo. 228, 15 Pac. 343, 3 Am. St. Rep. 567.

*Illinois*.—*Story v. Hull*, 41 Ill. App. 109.

*Kansas*.—*St. Louis & S. F. R. Co. v. Dudgeon*, 28 Kan. 283.

*Kentucky*.—*Louisville Gas Co. v. Hargis*, 33 S. W. 946; *Warren Deposit Bank v. Barclay*, 60 S. W. 853, 22 Ky. L. Rep. 1555.

*Louisiana*.—*Phillips v. Stewart*, 24 La. Ann. 152; *Lartigue v. White*, 25 La. Ann. 291; *Dinkelspiel v. Pons*, 119 La. 236, 43 So. 1018.

*Missouri*.—*Bogliolo v. Scott*, 5 Mo. 341.

*Nebraska*.—*Dillon v. Watson*, 3 Neb. (unofficial) Rep. 530, 92 N. W. 156.

*New York*.—*Nash v. Kneeland*, 41 Hun 646 mem., 4 N. Y. St. Rep. 135; *Sackett v. Breen*, 50 Hun 602 mem., 3 N. Y. S. 473; *Blake v. Andrews*, 56 Hun 641 mem., 9 N. Y. S. 363; *Wood v. Baldwin*, 56 Hun 647 mem., 10 N. Y. S. 195; *Van Every v. Adams*, 42 Super. Ct. 126; *Leavitt v. Chase*, 59 Super. Ct. 230, 13 N. Y. S. 883, *affirmed* 129 N. Y. 660, 29 N. E. 831.

*Oregon*.—*Nelson v. Blaisdell*, 23 Ore. 507, 32 Pac. 391.

*Texas*.—*Hamman v. Willis*, 62 Tex. 507.

*Washington*.—*Gottstein v. Harrington*, 25 Wash. 508, 65 Pac. 753; *Thorpe v. Ramsey*, 51 Wash. 530, 99 Pac. 584.

<sup>2</sup> *Spicer v. Yopp*, 30 Ga. 285; *Whallen v. Hallam*, 76 S. W. 860, 25 Ky. L. Rep. 965.

<sup>3</sup> *Blizzard v. Applegate*, 77 Ind. 516; *Morehead v. Anderson*, 125 Ky. 77, 100 S. W. 340; *Smith v. Couch*, 117 Mo. App. 267, 92 S. W. 1143.

<sup>4</sup> *Finney v. Pierrepont*, 18 App. Div. 627, 45 N. Y. S. 977; *Scharps v. Hess*, 120 N. Y. S. 56; *McMillan v. North-*

the cause may be reversed as to particular items, and affirmed as to others.<sup>5</sup> But these matters are almost exclusively governed by local practice acts, and rules of court, which must be consulted.

*Recovery Back from Attorney — Penalties.*

§ 569. **When Fees May Be Recovered Back.** — A client may recover back from his attorney such money as has been paid for the performance of professional services which the attorney refuses or neglects to render.<sup>6</sup> So, where an attorney has conducted himself so as to warrant the rescission of the contract of employment, his client may so rescind, and recover back all, or a part, of the fees which were paid in pursuance thereof, according to the circumstances.<sup>7</sup> And where complete performance by the attorney is prevented, as, for instance, by his death, the client may recover, from his estate, the unearned portion of the fee.<sup>8</sup> So, where an attorney was paid for procuring a divorce which was subsequently set aside because of gross irregularities in the proceeding, the client was permitted to recover back the fees paid to the attorney in ignorance of such irregularities.<sup>9</sup> The rule that money paid under a mistake of law is not recoverable back, does not apply as between attorney and client, nor as between the attorney and the opposite party, where the amount of compensation for the services rendered is regulated by statute.<sup>10</sup> Thus, where an attorney receives money, or any articles of value, by virtue of an order of court made in a cause in which he is counsel, and it is decreed, before he turns the same over to his client, that the order was erroneously granted, the court may order the restoration of the money to its former custodian.<sup>11</sup> So, also, counsel fees paid to one who was disqualified from practicing law, and in ignorance of that fact, may be recovered back from

port Smelting & Refining Co., 49 Wash. 76, 94 Pac. 761. See also *In re Knapp*, 8 Abb. N. Cas. (N. Y.) 308.

<sup>5</sup> *Williams v. Murrell*, 13 S. W. 1075, 12 Ky. L. Rep. 307.

<sup>6</sup> *Benton v. Craig*, 2 Mo. 198.

<sup>7</sup> *Hilton v. Crooker*, 30 Neb. 707, 47 N. W. 3.

<sup>8</sup> *Callahan v. Shotwell*, 60 Mo. 398; *McCammon v. Peck*, 6 Ohio Cir. Dec. 504, 9 Ohio Cir. Ct. 589.

<sup>9</sup> *Von Wallhoffen v. Newcombe*, 10 Hun (N. Y.) 236.

<sup>10</sup> *Moulton v. Bennett*, 18 Wend. (N. Y.) 586.

<sup>11</sup> *Pinkard v. Allen*, 75 Ala. 73.

such person.<sup>12</sup> Where a client, in pursuance of an unconscionable agreement, transferred a mortgage to the attorney's wife in payment of the exorbitant fee, the fact of the assignment to the wife will not relieve the attorney from the duty to reimburse the client.<sup>13</sup>

**§ 570. Recovery Back Denied.** — The mere fact that services for which an attorney has been paid have not been performed, is not, in itself, sufficient to warrant the recovery back of the attorney's fee; thus, where a client abandons a cause, for the management of which he has paid counsel in advance, the fees so paid cannot be recovered back, even though the suit was abandoned because the attorney was doubtful of its successful outcome.<sup>14</sup> Nor can the client recover back any part of the fee paid to an attorney for conducting litigation, on the ground that only a portion of the services originally contemplated has been performed, owing to the settlement of the litigation by the client.<sup>15</sup> And after a settlement has been had between attorney and client, it is then too late for the client to seek a return of the fees retained by the attorney, on the ground that the contract of employment was champertous.<sup>16</sup> So, where an attorney received and credited a certain sum of money for judgment creditors, and, by an understanding with his client, such sum was applied in payment of his fees, the transaction is equivalent to a payment over by the attorney to his client, so that, on the reversal of the judgment, the attorney will not be obliged to refund the payment

<sup>12</sup> *Evans v. Funk*, 151 Ill. 650, 38 N. E. 230.

As to unauthorized practice generally, see *supra*, §§ 69-71.

<sup>13</sup> *Eysaman v. Nelson*, 79 Misc. 304, 140 N. Y. S. 183.

<sup>14</sup> *Riehl v. Levy*, 43 Misc. 59, 86 N. Y. S. 464, 45 Misc. 425, 90 N. Y. S. 444.

*Compare Moore v. Robinson*, 92 Ill. 491, wherein it appeared that an attorney, who had been paid a certain sum and given a note by the brother of one indicted for a crime, agreed to

secure the acquittal of the accused at a specified term of court, or else pay back the money and surrender the note, and, through no fault of either party, the accused failed to appear at said term, or at any term afterwards, though he had not been tried or released, it was held that the attorney must pay back the money and surrender the note.

<sup>15</sup> *Mahoney v. Bergin*, 41 Cal. 423.

<sup>16</sup> *Caldwell v. Shepherd*, 6 T. B. Mon. (Ky.) 389.

at the suit of the judgment debtor.<sup>17</sup> And it has also been held that, unless founded upon a valid consideration, a client cannot recover back the costs of suit paid out by him with the understanding that, in case of failure in the litigation, the attorney would reimburse him therefor. Such an agreement has been said to be not only *nudum pactum*, but also contrary to public policy.<sup>18</sup>

**§ 571. Recovery of Penalties for Taking Unlawful Fees. —** In the early days, in some jurisdictions at least, the compensation of counsel for certain services was fixed by statute, and the taxation of larger fees than those so fixed was prohibited under penalty.<sup>19</sup> Only one penalty, however, could be collected for unlawful charges made in one bill of costs, irrespective of the number of items which were alleged to be excessive.<sup>20</sup> These laws are now obsolete; but there are still instances wherein certain fees are regulated by statute or rule of court.<sup>21</sup> It has been held that a statute making it unlawful for "officers" to charge illegal fees, does not apply to attorneys; and this is especially true where counsel fees are not regulated by statute.<sup>22</sup>

<sup>17</sup> McDonald v. Napier, 14 Ga. 89.

<sup>20</sup> Tanner v. Croxall, 17 N. J. L. 332.

<sup>18</sup> See *supra*, § 162.

<sup>21</sup> As to taxable costs and statutory

<sup>19</sup> State v. Andrews, 51 N. H. 582; Waters v. Whittemore, 22 Barb. (N. Y.) 593.

fees generally, see *supra*, §§ 484, 485.

<sup>22</sup> Rawson v. Porter, 9 Greenl. (Me.) 119.

## CHAPTER XXIII.

### LIENS GENERALLY

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##### § 572. In General.

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*Right to Lien.*

§ 572. **In General.** — The right of an attorney at law to retain the papers, money, or other property of a client, which comes into his possession in consequence of the professional relationship, as a security for the payment of his fees, has never been seriously questioned. This right is called a retaining lien, and will be more fully considered hereafter.<sup>1</sup> Beyond this, however, there is no uniform rule as to the right of an attorney to a lien for his compensation. At a very early day it was held in England that an attorney could enforce his claim for services rendered, against a judgment recovered by him for his client; and a like rule was

<sup>1</sup> See *infra*, §§ 573-577.

adopted in some of the states in this country, either as a part of the common law or by legislation. This right, which is usually classified as a charging lien, will also be considered later.<sup>2</sup> At the present day, however, charging liens are usually regulated by statutes<sup>3</sup> which, as a rule, specify the services for which a lien shall accrue,<sup>4</sup> the property or rights to which it shall attach,<sup>5</sup> the notice thereof to adverse parties and other persons who may be affected thereby,<sup>6</sup> and the manner of its enforcement;<sup>7</sup> while in other jurisdictions the right to a charging lien is not recognized at all.<sup>8</sup>

### *The Retaining Lien.*

§ 573. **Retaining Lien Defined and Distinguished.**—For the sake of convenience, the liens which may be asserted by an attorney at law are known, respectively, as “retaining” and “charging” liens.<sup>9</sup> They are also divided into “general” and “particular” liens. A particular lien is said to exist when the claim therefor arises with respect to the property claimed thereunder; while the general lien arises where the debt results from the general balance of the account.<sup>10</sup> The retaining lien is both particular and general; but the charging lien is only particular.<sup>11</sup>

The retaining lien may be defined as the right of an attorney at law to retain possession of such documents, money, or other

<sup>2</sup> See *infra*, §§ 578–582.

<sup>3</sup> See *infra*, § 582.

<sup>4</sup> See *infra*, §§ 592–599.

<sup>5</sup> See *infra*, § 613 et seq.

<sup>6</sup> See *infra*, §§ 600–605.

<sup>7</sup> See *infra*, § 653 et seq.

<sup>8</sup> See *infra*, § 579 note.

<sup>9</sup> *United States*.—In *re Wilson*, 12 Fed. 235.

*Illinois*.—*Sanders v. Seelye*, 128 Ill. 631, 21 N. E. 601, *affirming* 27 Ill. App. 288.

*Louisiana*.—*Butchers' Union Slaughter-House & Live Stock Landing Co. v. Crescent City Live Stock Landing & Slaughter-House Co.*, 41 La. Ann. 355, 6 So. 508.

*New York*.—*Goodrich v. McDonald*, 112 N. Y. 157, 19 N. E. 649; *Leask v. Hoagland*, 64 Misc. 156, 118 N. Y. S. 1035.

*Vermont*.—*Hurlbert v. Brigham*, 56 Vt. 372; *Weed Sewing Mach. Co. v. Bontelle*, 56 Vt. 570, 48 Am. Rep. 821.

<sup>10</sup> *Butchers' Union Slaughter-House & Live Stock Landing Co. v. Crescent City Live Stock Landing & Slaughter-House Co.*, 41 La. Ann. 355, 6 So. 508.

<sup>11</sup> *Butchers' Union Slaughter-House & Live Stock Landing Co. v. Crescent City Live Stock Landing & Slaughter-House Co.*, 41 La. Ann. 355, 6 So. 508.

property of his client coming into his hands by virtue of the professional relationship, until he has been paid for his services,<sup>12</sup> or until he voluntarily surrenders possession of the property with or without payment.<sup>13</sup> Viewed in this light, there is practically no distinction between an attorney's lien and the lien of a mechanic, materialman, or other artisan.<sup>14</sup> There is a wide difference, however, between an attorney's retaining lien and his charging lien, not only in respect to the extent of the claim secured by each,<sup>15</sup> but also as to the manner of their enforcement.<sup>16</sup> In some jurisdictions, however, the retaining and charging liens have been so combined in legislation regulating this subject as to make these distinctions valueless. The charging lien generally will be considered hereafter.<sup>17</sup>

§ 574. **Origin.**—The retaining lien is derived from the common law,<sup>18</sup> and is based partly on custom, and partly on the desire to prevent circuity of action.<sup>19</sup> The same power which authorizes courts summarily to enforce the performance by attorneys of their duties towards their clients, is exercised to protect the just rights of attorneys in settlements between them and their clients,<sup>20</sup> and

<sup>12</sup> *United States*.—In *re Wilson*, 12 Fed. 235; In *re Gillaspie*, 190 Fed. 88.

*Illinois*.—*Sanders v. Seelye*, 128 Ill. 631, 21 N. E. 601.

*Indiana*.—*Koons v. Beach*, 147 Ind. 137, 45 N. E. 601, 46 N. E. 587.

*Nebraska*.—*Sayre v. Thompson*, 18 Neb. 33, 24 N. W. 383; *Cones v. Brooks*, 60 Neb. 698, 84 N. W. 85.

*New York*.—*Rooney v. Second Ave. R. Co.*, 18 N. Y. 372; *Goodrich v. McDonald*, 112 N. Y. 157, 19 N. E. 649; *Leask v. Hoagland*, 64 Misc. 156, 118 N. Y. S. 1035.

*Pennsylvania*.—*Balsbaugh v. Frazier*, 19 Pa. St. 95; *Dubois's Appeal*, 38 Pa. St. 231, 80 Am. Dec. 478; *McKelvy's Appeal*, 108 Pa. St. 615, *practically overruling* *Walton v. Dickerson*, 7 Pa. St. 376, in so far as it may be deemed to be contrary to the proposition stated in the text.

*Vermont*.—*Weed Sewing Mach. Co. v. Boutelle*, 56 Vt. 570, 48 Am. Rep. 821.

Doctrine that possession must be consistent with lien rights, see *infra*, § 639.

<sup>13</sup> *Scott v. Morris*, 131 Ill. App. 605. And see *infra*, § 612.

<sup>14</sup> *Leask v. Hoagland*, 64 Misc. 156, 118 N. Y. S. 1035.

<sup>15</sup> See *infra*, §§ 592-599.

<sup>16</sup> See *infra*, § 653 et seq.

<sup>17</sup> See *infra*, §§ 578-582.

<sup>18</sup> *Sayre v. Thompson*, 18 Neb. 43, 24 N. W. 383; In *re Lexington Ave.*, 30 App. Div. 602, 52 N. Y. S. 203; *Matter of McGuire*, 106 App. Div. 131, 94 N. Y. S. 97.

<sup>19</sup> *Weed Sewing Mach. Co. v. Boutelle*, 56 Vt. 570, 48 Am. Rep. 821.

<sup>20</sup> *Butchers' Union Slaughter-House & Live Stock Landing Co. v. Cres-*

it is neither inapplicable to the habits and conditions of our society, nor contrary to the genius, spirit, and objects of our institutions.<sup>1</sup> And in some jurisdictions, wherein the retaining lien is regulated by statute, it has been held that such statutes are merely declaratory of the common law, and that the attorney has the dual right to claim his lien either under the common law or under the statute.<sup>2</sup> It has been held, however, that the right of an attorney to retain compensation from funds in his hands results from the law of set-off, and not from the law of lien.<sup>3</sup> And in Louisiana the right to retain compensation is governed by the law of mandate.<sup>4</sup> The federal courts recognize no lien at common law in behalf of an attorney beyond that given by the local law;<sup>5</sup> but where lien rights exist, the federal courts do not hesitate to enforce them.<sup>6</sup>

**§ 575. Nature.** — The retaining lien is a mere right to retain the papers or other property on which it exists;<sup>7</sup> and while it attaches to every species of property belonging to the client, and which has come to the attorney's possession in the course of his employment,<sup>8</sup> it cannot be actively asserted or enforced.<sup>9</sup> It is founded upon possession,<sup>10</sup> and is unassignable.<sup>11</sup> Indeed, any transfer of the possession, without the consent of the client, is not

cent City Live Stock Landing & Slaughter-House Co., 41 La. Ann. 355, 6 So. 508.

<sup>1</sup> *Sanders v. Seelye*, 128 Ill. 631, 21 N. E. 601.

<sup>2</sup> *Sayre v. Thompson*, 18 Neb. 43, 24 N. W. 383; *Zentmire v. Brailey*, 89 Neb. 158, 130 N. W. 1047; *Matter of McGuire*, 106 App. Div. 131, 94 N. Y. S. 97.

<sup>3</sup> *Wells v. Hatch*, 43 N. H. 246.

<sup>4</sup> *Butchers' Union Slaughter-House & Live Stock Landing Co. v. Crescent City Live Stock Landing & Slaughter-House Co.*, 41 La. Ann. 355, 6 So. 508.

<sup>5</sup> *Gregory v. Pike*, 67 Fed. 837, 21 U. S. App. 658, 15 C. C. A. 33.

<sup>6</sup> *U. S. v. Boyd*, 79 Fed. 858.

<sup>7</sup> *In re Wilson*, 12 Fed. 235; *Curtis v. Richards*, 4 Idaho 434, 40 Pac. 57, 95 Am. St. Rep. 134; *Foss v. Cobler*, 105 Ia. 728, 75 N. W. 516; *McDonald v. Charleston, C. & C. R. Co.*, 93 Tenn. 281, 24 S. W. 252.

<sup>8</sup> *Leask v. Hoagland*, 64 Misc. 156, 118 N. Y. S. 1035.

<sup>9</sup> See *infra*, § 653 et seq.

<sup>10</sup> *Leask v. Hoagland*, 64 Misc. 156, 118 N. Y. S. 1035. See also the following section, and compare § 639 *infra*.

<sup>11</sup> *Sullivan v. New York*, 68 Hun 544, 22 N. Y. S. 1041; *Leask v. Hoagland*, 64 Misc. 156, 118 N. Y. S. 1035. And see also *infra*, § 611.

only a breach of the attorney's duty to his client, but confers no right on the transferee.<sup>12</sup>

**§ 576. Necessity of Possession.** — It is essential to the existence of a retaining lien that the property claimed thereunder be in the possession of the attorney; <sup>13</sup> thus, it has been held that an attorney has no lien on papers filed by him in court in his client's cause; nor can he withdraw them.<sup>14</sup> So, also, it is essential that an attorney's possession of property, as against which he asserts a retaining lien, should have been obtained in the course of his professional employment; <sup>15</sup> but, if the possession had been so obtained, the particular purpose for which the property was placed with the attorney is immaterial,<sup>16</sup> excepting, of course, that such purpose must not be inconsistent with, or adverse to, the attorney's right to claim a lien thereon.<sup>17</sup>

**§ 577. Compelling Surrender of Possession without Payment.** — An attorney at law cannot, ordinarily at least, be compelled to surrender the papers or other property held by him by virtue of a retaining lien, until his fees have been paid,<sup>18</sup> even by

<sup>12</sup> *Sullivan v. New York*, 68 Hun 544, 22 N. Y. S. 1041.

<sup>13</sup> *United States*.—In re Wilson, 12 Fed. 235.

*Illinois*.—Nichols v. Pool, 89 Ill. 491.

*Nebraska*.—Cones v. Brooks, 60 Neb. 698, 84 N. W. 85.

*New York*.—St. John v. Diefendorf, 12 Wend. 261; *Sullivan v. New York*, 68 Hun 544, 22 N. Y. S. 1041; *Leask v. Hoagland*, 64 Misc. 156, 118 N. Y. S. 1035; *Hinman v. Devlin*, 40 App. Div. 234, 57 N. Y. S. 1037.

*Ohio*.—*Dodson v. Riddle*, 1 Ohio Dec. 54.

*Pennsylvania*.—*Eddinger v. Adams*, 4 Kulp 401; *Dubois' Appeal*, 38 Pa. St. 231, 80 Am. Dec. 478; *Appeal of McKelvy*, 108 Pa. St. 615.

*Texas*.—*Texas Mex. R. Co. v.*

*Showalter*, 3 Willson Civ. Cas. Ct. App. § 69; *Thomson v. Findlater Hardware Co.*, 156 S. W. 301.

*Vermont*.—*Weed Sewing Mach. Co. v. Boutelle*, 56 Vt. 570, 48 Am. Rep. 821.

*West Virginia*.—*Hazeltine v. Keenan*, 54 W. Va. 600, 46 S. E. 609, 102 Am. St. Rep. 953.

<sup>14</sup> *Dodson v. Riddle*, 1 Ohio Dec. (Reprint) 54, 1 Cine. L. Bul. 393.

<sup>15</sup> *Henry v. Fowler*, 3 Daly (N. Y.) 199; *Martin v. Throckmorton*, 15 Pa. Super. Ct. 632; *Winans v. Grable*, 18 S. D. 182, 99 N. W. 1110.

<sup>16</sup> *Sanders v. Seelye*, 128 Ill. 631, 21 N. E. 601; *Scott v. Morris*, 131 Ill. App. 605.

<sup>17</sup> See *infra*, § 639.

<sup>18</sup> *England*.—*Ross v. Loughton*, 1 Ves. & B. 349.

a subpœna duces tecum issued on behalf of the client;<sup>19</sup> nor can he be compelled to deliver papers so held to the court.<sup>20</sup> But an attorney may be compelled to produce papers which are in his possession, and on which he claims a lien, in case of an emergency pressing for their use;<sup>1</sup> thus, he may be compelled to produce a will for the purpose of having it probated.<sup>2</sup> And in England the rule was modified so as to compel a solicitor to deliver to his successor such of the client's papers as were material to the due prosecution of the cause, without prejudice, however, to lien rights, and upon the giving of an undertaking either to return such papers undefaced, or to hold them subject to the lien of the original solicitor.<sup>3</sup> So, where a dispute arises between attorney and client as to the amount of the attorney's compensation, the matter may be determined by the court, and the surrender of the property ordered on payment of the amount found to be due,<sup>4</sup> or on the payment into court of the amount claimed pending the determination,<sup>5</sup> or on the giving of an undertaking therefor.<sup>6</sup> But it seems that where a client discharges his attorney without cause, the attorney will not be compelled to produce papers upon which he has a lien.<sup>7</sup>

*United States*.—In re Wilson, 12 Fed. 235; Davis v. Davis, 90 Fed. 791.

*Idaho*.—Curtis v. Richards, 4 Idaho 434, 40 Pac. 57, 95 Am. St. Rep. 134.

*New York*.—Ulster Comty v. Brodhead, 44 How. Pr. 411; In re H——, 87 N. Y. 521; Rubel v. Burr, 132 App. Div. 910, 117 N. Y. S. 63.

*Tennessee*.—Hunt v. McClanahan, 1 Heisk. 506.

<sup>19</sup> Davis v. Davis, 90 Fed. 791.

<sup>20</sup> Finance Co. of Pennsylvania v. Charleston, C. & C. R. Co., 48 Fed. 15, 52 Fed. 526.

<sup>1</sup> Brassington v. Brassington, 1 Sim. & St. (Eng.) 455; Ross v. Lough-ton, 1 Ves. & B. (Eng.) 349; Trust v. Repoor, 15 How. Pr. (N. Y.) 570.

<sup>2</sup> In re Bracher's Will, 60 N. J. Eq. 350, 51 Atl. 63.

<sup>3</sup> Heslop v. Metcalfe, 3 Myl. & C. (Eng.) 183; Colegrave v. Manley, T. & R. (Eng.) 400; Cane v. Martin, 2 Beav. (Eng.) 584.

<sup>4</sup> McPherson v. Cox, 96 U. S. 404, 24 U. S. (L. ed.) 746; Falardeau v. Washburn, 199 Mass. 363, 85 N. E. 171.

<sup>5</sup> Re Bevan, 33 Beav. (Eng.) 439.

<sup>6</sup> Re Jewitt, 34 Beav. (Eng.) 22; Cunningham v. Widing, 5 Abb. Pr. (N. Y.) 413.

<sup>7</sup> Heslop v. Metcalfe, 3 Myl. & C. (Eng.) 183; Bozon v. Bolland, 4 Myl. & C. (Eng.) 354; Lord v. Worm-leighton, Jac. (Eng.) 580.

*The Charging Lien.*

## § 578. Charging Lien Defined and Distinguished. —

The charging lien, originally, was defined to be the right of an attorney at law to recover compensation for his services from a fund recovered by his aid, and also the right to be protected by the court to the end that such recovery might be effected.<sup>8</sup> Unlike the retaining lien, the charging lien does not depend upon possession,<sup>9</sup> but upon the favor of the court in protecting attorneys, as its own officers, by taking care, *ex aequo et bono*, that a party should not run away with the fruits of the cause without satisfying the legal demands of the attorney by whose industry those fruits were obtained.<sup>10</sup> In this connection the use of the term "lien" has been criticised as an incorrect expression, and it has been stated that the attorney has merely a claim to the equitable interference of the court to intervene for his protection.<sup>11</sup> Nor is the charging lien a merely passive one, but, on the contrary, it entitles the attorney to take active steps to secure its satisfaction.<sup>12</sup> So, also, a charging lien may be assigned, where such assignment carries with it no breach of the attorney's duty to preserve his client's confidence inviolate;<sup>13</sup> where, however, the attorney is entrusted with property bound by the lien, as where papers of the client come into his possession in the course of his professional employment, an entirely different question is presented.<sup>14</sup> The distinction between an attorney's "retaining lien" upon papers in his possession, and his "charging lien" upon a judgment or other fund, is carefully pointed out in *Bozon v. Boland*,<sup>15</sup> wherein the Lord Chancellor said: "The solicitor's claim upon the fund has been called transferring the lien from the document to the fund recovered by its production. But there is no

<sup>8</sup> *Fillmore v. Wells*, 10 Colo. 228, 15 Pac. 343, 3 Am. St. Rep. 567; *Randall v. Van Wageningen*, 115 N. Y. 527, 22 N. E. 361, 12 Am. St. Rep. 828; *Weed Sewing-Machine Co. v. Foutelle*, 56 Vt. 570, 48 Am. Rep. 821.

<sup>9</sup> *In re Wilson*, 12 Fed. 235.

<sup>10</sup> See *infra*, § 580.

<sup>11</sup> *Barker v. St. Quintin*, 12 M. &

W. (Eng.) 441; *Hough v. Edwards*, 1 H. & N. (Eng.) 171.

<sup>12</sup> *In re Wilson*, 12 Fed. 235.

<sup>13</sup> *Leask v. Hoagland*, 64 Misc. 156, 118 N. Y. S. 1035.

<sup>14</sup> *Leask v. Hoagland*, 64 Misc. 156, 118 N. Y. S. 1035.

<sup>15</sup> 4 Myl. & C. (Eng.) 354, 359.

transfer; for the lien upon the deed remains as before, though perhaps of no value; and whereas the lien upon the deed could never have been actively enforced, the lien upon the fund, if established, would give a title to payment out of it. The active lien upon the fund, if it exists at all, is newly created, and the passive lien upon the deed continues as before." At the present day, however, the charging lien of an attorney has been so enlarged, in many jurisdictions, as to encompass much more than it did originally; this subject will be considered hereafter.<sup>16</sup>

§ 579. **Origin of Lien.** — The right of an attorney to a charging lien on a judgment or other fund recovered by him for his client, as security for his fees, is undoubtedly of common-law origin,<sup>17</sup> notwithstanding the many expressions to the contrary to be found in the books.<sup>18</sup> The case of *Welsh v. Hole*,<sup>19</sup> decided by Lord Mansfield in 1779, seems to have been the first authentic declaration of the existence of the charging lien. That great jurist said: "An attorney has a lien on the money recovered by his client for his bill of costs; if the money come to his hands, he may retain to the amount of his bill. He may stop it *in transitu* if he can lay hold of it. If he apply to the court, they will prevent its being paid over till his demand is satisfied. I am inclined to go farther, and to hold that, if the attorney gave notice to the defendant not to pay till his bill should be discharged, a payment by the defendant after such notice would be in his own wrong,

<sup>16</sup> See *infra*, § 613 et seq.

<sup>17</sup> Massachusetts & Southern Const. Co. v. Gill's Creek Tp., 48 Fed. 145; *Brown v. Morgan*, 163 Fed. 395; *Stewart v. Flowers*, 44 Miss. 513, 7 Am. Rep. 707; *Young v. Renshaw*, 102 Mo. App. 173, 76 S. W. 701; *Goodrich v. McDonald*, 112 N. Y. 163, 19 N. E. 648; *Randall v. Van Wagemen*, 115 N. Y. 527, 22 N. E. 361, 12 Am. St. Rep. 828; *Canary v. Russell*, 10 Misc. 597, 24 Civ. Proc. 109, 31 N. Y. S. 291.

<sup>18</sup> Statements to the effect that the charging lien is of statutory origin,

may have resulted from the failure to recognize the distinction between attorneys at law in England and in this country. Here, the attorney is also counsel and advocate, and may recover compensation as such (see *supra*, § 404); while in England, counsel fees are not recoverable, and those of attorneys and solicitors are fixed by statute (see *supra*, § 402). In this connection it will be observed that the charging lien originated as to "attorney's" fees.

<sup>19</sup> 1 Dougl. (Eng.) 238.



and like paying a debt that has been assigned, after notice."<sup>20</sup> It is evident, however, that the charging lien was fairly well known to the law at that time, for, in an earlier case, in speaking of attorneys' liens, the same judge said that they were "established on general principles of justice, and that courts both of law and equity have now carried it so far, that an attorney or solicitor may obtain an order to stop his client from receiving money recovered in a suit in which he has been employed for him, till his bill is paid."<sup>1</sup> The case of *Welsh v. Hole*, *supra*, was followed in England and in many of the states in this country, so that an attorney's right to an equitable lien on a judgment recovered by him for his client, to the extent of his reasonable fees at least, became firmly established.<sup>2</sup> In some jurisdictions, however, the charging lien is not recognized,<sup>3</sup> while in others it is regulated by statute;<sup>4</sup> and in Pennsylvania, although the charging lien is not

<sup>20</sup> See also *Barker v. St. Quintin*, 12 M. & W. (Eng.) 441; *Goodrich v. McDonald*, 112 N. Y. 157, 19 N. E. 649.

<sup>1</sup> *Wilkins v. Carmichael*, 1 Dougl. (Eng.) 101, 105. See also *Goodrich v. McDonald*, 112 N. Y. 157, 19 N. E. 649.

<sup>2</sup> *England*.—*Sullivan v. Pearson*, L. R. 4 Q. B. 153, 38 L. J. Q. B. 65; *Barker v. St. Quintin*, 12 M. & W. 441, 1 Dowl. & L. 542; *Griffin v. Eyles*, 1 H. Bl. 122; *Cox v. Pritchard*, 20 L. J. Q. B. 353; *Slater v. Sunderland*, 33 L. J. Q. B. 37, 9 L. T. N. S. 422.

*United States*.—*U. S. v. Boyd*, 79 Fed. 858.

*Alabama*.—*Warfield v. Campbell*, 38 Ala. 527, 82 Am. Dec. 724; *Ex p. Lehman*, Durr & Co., 59 Ala. 631; *McWilliams v. Jenkins*, 72 Ala. 480; *Higley v. White*, 102 Ala. 604, 15 So. 141. See also *Central R. & B. Co. v. Pettus*, 113 U. S. 116, 5 S. Ct. 387, 25 U. S. (L. ed.) 915 (decided under the Alabama practice).

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*Indiana*.—*Hill v. Brinkley*, 10 Ind. 102.

*Mississippi*.—*Stewart v. Flowers*, 44 Miss. 518, 7 Am. Rep. 707.

*New Hampshire*.—*Young v. Dearborn*, 27 N. H. 324; *Christie v. Sawyer*, 44 N. H. 298.

*New York*.—*Williams v. Ingersoll*, 23 Hun 284; *Haight v. Holcomb*, 7 Abb. Pr. 210; *Hall v. Ayer*, 9 Abb. Pr. 220; *Cragin v. Travis*, 1 How. Pr. 157; *Rooney v. Second Ave. R. Co.*, 18 N. Y. 368.

<sup>3</sup> *Illinois*.—*Sanders v. Seelye*, 128 Ill. 631, 21 N. E. 601, *affirming* 27 Ill. App. 288; *Cameron v. Boeger*, 102 Ill. App. 649, *affirmed* 200 Ill. 84, 65 N. E. 690, 93 Am. St. Rep. 165.

*Pennsylvania*.—*Dubois's Appeal*, 38 Pa. St. 231, 80 Am. Dec. 478; *McKelvy's Appeal*, 108 Pa. St. 615; *Patrick v. Smith*, 2 Pa. Super. Ct. 113; *In re Aber*, 18 Pa. Super. Ct. 110. See also *Cain v. Hoekensmith Wheel & Car Co.*, 157 Fed. 992 (decided under the Pennsylvania rule).

<sup>4</sup> See *infra*, § 582. And see *Hump-*

recognized, it seems that an attorney may claim his fees from a fund "within the grasp of the court."<sup>5</sup>

**§ 580. Basis of Lien.** — The doctrine under which the charging lien became effective was established on general principles of justice,<sup>6</sup> and it rests upon the theory that one should not be permitted to profit by the result of litigation without satisfying the demand of his attorney.<sup>7</sup> It has been well described as "a mere arbitrary exercise of power by the courts; not arbitrary in the sense that it was unjust or improper, but in the sense that it was not based upon any right or principle recognized in other cases." The parties being in court, and a suit commenced and pending, the courts invented this practice, and assumed this extraordinary power, for the purpose of protecting attorneys in their compensation.<sup>8</sup> At the present day, however, the charging lien is recognized and regulated by statute in most jurisdictions.<sup>9</sup>

**§ 581. Nature of Lien.** — The attorney's charging lien is equitable in its nature,<sup>10</sup> whether it be asserted as a common-law right, or under a statute. Even the decisions in this country, which confine the existence and application of the charging lien to the narrowest limits, always speak of it as an equitable lien,

*tulips Driving Co. v. Cross*, 65 Wash. 636, 118 Pac. 827, 37 L.R.A.(N.S.) 226, where it is said that it is not necessary to inquire whether an attorney had a lien on his client's judgment at common law; for the statute covers the entire subject, and creates the lien, and that is the only one that can be enforced.

<sup>5</sup> *Seybert v. Salem Tp.*, 22 Pa. Super. Ct. 459.

<sup>6</sup> *Goodrich v. McDonald*, 112 N. Y. 157, 19 N. E. 649.

<sup>7</sup> *England*.—*Read v. Dupper*, 6 T. R. 361.

*United States*.—*In re Wilson*, 12 Fed. 235.

*Mississippi*.—See *Stewart v. Flowers*, 44 Miss. 513, 7 Am. Rep. 707.

*New York*.—*Rooney v. Second Ave. R. Co.*, 18 N. Y. 372; *Goodrich v. McDonald*, 112 N. Y. 163, 19 N. E. 649; *Ward v. Wordsworth*, 1 E. D. Smith 598; *Perry v. Myer*, 89 N. Y. S. 347.

*Tennessee*.—*Brown v. Bigley*, 3 Tenn. Ch. 623.

*West Virginia*.—*Renick v. Ludington*, 16 W. Va. 391.

<sup>8</sup> *Stearns v. Wollenberg*, 51 Ore. 88, 92 Pac. 1079, 14 L.R.A.(N.S.) 1095.

<sup>9</sup> See *infra*, § 582.

<sup>10</sup> *Hough v. Edwards*, 37 Eng. L. & Eq. 470; *Ackerman v. Ackerman*, 14 Abb. Pr. (N. Y.) 229; *Brown v. Bigley*, 3 Tenn. Ch. 623; *Renick v. Ludington*, 16 W. Va. 391.

right, or privilege.<sup>11</sup> It is a right to the equitable interference of the court to have a judgment or other property held as security for the payment of the attorney's compensation.<sup>12</sup> And while, in a broad sense, it is properly denominated a "lien," it has but few points of resemblance to the ordinary lien upon tangible property.<sup>13</sup> Indeed, it differs from every other lien known to the law, in that it may exist although the attorney has not nor, in any proper sense, can he have, possession of the judgment or other property to which the lien may attach.<sup>14</sup> It has been held that an attorney's charging lien is, to some extent at least, an ownership in the property to which it attaches, and, as such, as effective as would be an assignment thereof as collateral security.<sup>15</sup>

§ 582. **Under Statutes.**—In most jurisdictions the attorney's charging lien is provided for and regulated by legislation; and, of course, where this is true, the statutory provisions must govern.<sup>16</sup> Statutes of this character, being remedial, are to be liberal-

<sup>11</sup> Fillmore *v.* Wells, 10 Colo. 228, 15 Pac. 343, 3 Am. St. Rep. 567.

<sup>12</sup> Mercer *v.* Graves, L. R. 7 Q. B. (Eng.) 499; In re Gillaspie, 190 Fed. 88; Koons *v.* Beach, 147 Ind. 137, 45 N. E. 601, 46 N. E. 587; Bruce *v.* Anderson, 176 Mass. 161, 57 N. E. 354.

<sup>13</sup> Wright *v.* Cobleigh, 21 N. H. 341.

<sup>14</sup> Goodrich *v.* McDonald, 112 N. Y. 157, 19 N. E. 649.

<sup>15</sup> Hobson *v.* Watson, 34 Me. 20, 56 Am. Dec. 632.

<sup>16</sup> *United States*.—In re Scoggin, 5 Sawy. 549, 21 Fed. Cas. No. 12,511; In re Gillaspie, 190 Fed. 88.

*Colorado*.—Fillmore *v.* Wells, 10 Colo. 228, 15 Pac. 343, 3 Am. St. Rep. 567.

*Georgia*.—Tarver *v.* Tarver, 53 Ga. 43.

*Illinois*.—People *v.* Nedrow, 25 Ill. App. 28, 122 Ill. 363, 13 N. E. 533.

*Iowa*.—Ward *v.* Sherbondy, 96 Ia. 477, 65 N. W. 413.

*Louisiana*.—See Butchers' Union Slaughter-House & Live Stock Landing Co. *v.* Crescent City Live Stock Landing & Slaughter-House Co., 41 La. Ann. 355, 6 So. 508.

*Massachusetts*.—Ocean Ins. Co. *v.* Rider, 22 Pick. 210; Baker *v.* Cook, 11 Mass. 236; Thayer *v.* Daniels, 113 Mass. 129.

*Minnesota*.—Forbush *v.* Leonard, 8 Minn. 303; Crowley *v.* Le Due, 21 Minn. 412; Nielsen *v.* Albert Lea, 91 Minn. 388, 392, 98 N. W. 195, 197.

*Missouri*.—Frissell *v.* Haile, 18 Mo. 18; Gulick *v.* Huntley, 144 Mo. 252, 46 S. W. 154; Roberts *v.* Nelson, 22 Mo. App. 28; Alexander *v.* Grand Ave. R. Co., 54 Mo. App. 66; Young *v.* Renshaw, 102 Mo. App. 173, 76 S. W. 701; Conkling *v.* Austin, 111 Mo. App. 292, 86 S. W. 911; Curtis *v.* Metropolitan St. R. Co., 118 Mo. App. 341, 94 S. W. 762.

ly construed,<sup>17</sup> and should not be given a retroactive effect, unless that purpose is made manifest by the language of the act.<sup>18</sup>

### *Lien Created by Contract.*

§ 583. **Generally.**—In some jurisdictions a contract between attorney and client, whereby the attorney is to receive a stipulated portion of the recovery, has been held to be an equitable lien,<sup>19</sup>

*New York.*—New York Judiciary Law, § 475; Fischer-Hansen v. Brooklyn Heights R. Co., 173 N. Y. 492, 66 N. E. 395, *reversing* 63 App. Div. 356, 71 N. Y. S. 513; In re Pieris, 176 N. Y. 566, 68 N. E. 1123, *affirming* 82 App. Div. 466, 81 N. Y. S. 927; Rochford v. Metropolitan St. R. Co. 50 App. Div. 261, 30 Civ. Proc. 285, 63 N. Y. S. 1036; Mathot v. Triebel, 98 App. Div. 328, 90 N. Y. S. 903; Kuehn v. Syracuse Rapid Transit R. Co., 104 App. Div. 580, 93 N. Y. S. 883; In re Scherer, 111 App. Div. 23, 35 Civ. Proc. 314, 97 N. Y. S. 171; Ransom v. Cutting, 112 App. Div. 150, 98 N. Y. S. 282, *affirmed* 188 N. Y. 447, 81 N. E. 324; In re Edward Ney Co., 114 App. Div. 467, 99 N. Y. S. 982; In re Robinson, 59 Misc. 323, 112 N. Y. S. 280; Lansing v. Ensign, 62 How. Pr. 363.

*North Dakota.*—Clark v. Sullivan, 3 N. D. 280, 55 N. W. 733.

*Washington.*—Humptulips Driving Co. v. Cross, 65 Wash. 636, 118 Pac. 827, 37 L.R.A.(N.S.) 226.

<sup>17</sup>Crowley v. Le Due, 21 Minn. 412, *distinguishing* Forbush v. Leonard, 8 Minn. 303; Wait v. Atchison, T. & S. F. R. Co., 201 Mo. 491, 103 S. W. 60; Fischer-Hansen v. Brooklyn Heights R. Co., 173 N. Y. 492, 66 N. E. 395.

<sup>18</sup>Leahart v. Deedmeyer, 158 Ala.

295, 48 So. 371; Northup v. Hayward, 102 Minn. 307, 12 Ann. Cas. 341, 113 N. W. 701; Goodrich v. McDonald, 112 N. Y. 157, 19 N. E. 649; Matter of Rowland, 55 App. Div. 66, 66 N. Y. S. 1121; Adee v. Adee, 55 App. Div. 63, 66 N. Y. S. 1101; Potter v. Ajax Min. Co., 19 Utah 421, 57 Pac. 270.

<sup>19</sup>*United States.*—Wilkinson v. Tilden, 21 Blatchf. 192, 14 Fed. 778; In re Paschal, 10 Wall. 483, 19 U. S. (L. ed.) 992; Wylie v. Cox, 15 How. 415, 14 U. S. (L. ed.) 753; Ingersoll v. Coram, 211 U. S. 335, 29 S. Ct. 92, 53 U. S. (L. ed.) 208, *affirming* 127 Fed. 418. See also Greenhalgh v. The Alice Strong, 57 Fed. 249, *distinguishing* Kendall v. U. S., 7 Wall. 113, 19 U. S. (L. ed.) 85; Mackall v. Willoughby, 167 U. S. 681, 17 S. Ct. 954, 42 U. S. (L. ed.) 323.

*California.*—Goad v. Hart, 128 Cal. 197, 60 Pac. 761, 964.

*Colorado.*—Patrick v. Morrow, 33 Colo. 509, 81 Pac. 242, 108 Am. St. Rep. 107.

*Connecticut.*—Cooke v. Thresher, 51 Conn. 105.

*District of Columbia.*—Hutchinson v. Worthington, 7 App. Cas. 548.

*Illinois.*—Smith v. Young, 62 Ill. 210.

*Kansas.*—Costigan v. Stewart, 76 Kan. 553, 91 Pac. 83, 11 L.R.A.(N.S.) 630.

or assignment,<sup>20</sup> for the amount agreed upon. The contract, however, must be a valid one.<sup>21</sup> But a mere executory agreement to the effect that an attorney shall share in the recovery, is not sufficient to create an equitable interest either by way of lien or assignment.<sup>1</sup> Nor will a verbal promise by a judgment creditor to pay his attorney out of the proceeds of the judgment, create a lien thereon.<sup>2</sup> And in some states, an attorney will not be entitled to a lien in the absence of an express contract out of which an equitable assignment arises.<sup>3</sup>

*To Whom Lien Accrues.*

§ 584. Generally. — A charging lien for professional services can only be enforced on behalf of a lawyer.<sup>4</sup> One who has not been admitted to practice as an attorney at law is not entitled to

*Maryland.*—*Gothenburg Svea Assur. Co. v. Packham*, 92 Md. 464 48 Atl. 359, 52 L.R.A. 95.

*Michigan.*—*Wells v. Elsam*, 40 Mich. 218; *Grand Rapids & I. R. Co. v. Cheboygan Circuit Judge*, 161 Mich. 181, 126 N. W. 56, 137 Am. St. Rep. 495, 17 Detroit Leg. N. 270; *Foley v. Grand Rapids & I. R. Co.*, 168 Mich. 496, 134 N. W. 446.

*Missouri.*—*Yonge v. St. Louis Transit Co.*, 109 Mo. App. 235, 84 S. W. 184.

*New Jersey.*—*Wilson v. Seeber*, 72 N. J. Eq. 523, 66 Atl. 909.

*New York.*—*Harwood v. LaGrange*, 137 N. Y. 538, 32 N. E. 1000; *Ferris v. Lawrence*, 138 App. Div. 541, 123 N. Y. S. 209; *Whitehead v. O'Sullivan*, 12 Misc. 577, 33 N. Y. S. 1098; *Kennedy v. Steele*, 35 Misc. 105, 71 N. Y. S. 237; *Stewart v. Fleck*, 43 Hun 636 mem., 6 N. Y. St. Rep. 524.

*Wisconsin.*—*Stanley v. Bouck*, 107 Wis. 225, 83 N. W. 298.

<sup>20</sup> *Weeks v. Wayne Circuit Judges*, 73 Mich. 256, 41 N. W. 269; *Drei-*

*band v. Candler*, 166 Mich. 49, 131 N. W. 129; *Wright v. Wright*, 70 N. Y. 98. And see *Williams v. Ingersoll*, 89 N. Y. 508.

<sup>21</sup> *Davis v. Sharron*, 15 B. Mon. (Ky.) 64.

<sup>1</sup> *Trist v. Child*, 21 Wall. 441, 22 U. S. (L. ed.) 623, and *Porter v. White*, 127 U. S. 235, 8 S. Ct. 1217, 32 U. S. (L. ed.) 112; *Boyle v. Boyle*, 116 Fed. 764; *De Winter v. Thomas*, 34 App. Cas. (D. C.) 80, 27 L.R.A. (N.S.) 634; *Newell v. West*, 149 Mass. 520, 21 N. E. 954, distinguished *Jernegan v. Osborn*, 155 Mass. 207, 29 N. E. 520; *Weller v. Jersey City, H. & P. St. R. Co.*, 68 N. J. Eq. 659, 6 Ann. Cas. 442, 61 Atl. 459, *affirming* 66 N. J. Eq. 11, 57 Atl. 730.

<sup>2</sup> *Gribble v. Ford*, (Tenn.) 52 S. W. 1007. See also *Tone v. Shankland*, 110 Ia. 525, 81 N. W. 789.

<sup>3</sup> *Story v. Hull*, 143 Ill. 506, 32 N. E. 265.

<sup>4</sup> *In re Bensel*, 68 Misc. 70, 124 N. Y. S. 726.

such a lien,<sup>5</sup> nor, indeed, can he claim compensation as a lawyer.<sup>6</sup> So, a corporation, not being entitled to practice law, cannot claim an attorney's lien.<sup>7</sup> Nor can an attorney claim a lien in an action commenced by him without the authority of his client.<sup>8</sup> Nor will the association of a licensed attorney with an unlicensed person entitle both of them to a lien.<sup>9</sup> But where an attorney died, and his executrix employed other counsel and carried the litigation to a successful termination, no objection having been interposed by the client, it was held that the executrix was entitled to a lien on the judgment.<sup>10</sup> So, where the validity of a decree declaring a lien in favor of several attorneys was objected to on the ground that one of such attorneys was neither a resident of the state, nor attorney of record, nor a licensed attorney, it was held that the decree would not be disturbed where it appeared that the non-resident attorney had rendered valuable services in the case, and the amount of the lien would not have been excessive for the services of the other attorneys, against whom no objections were presented.<sup>11</sup>

§ 585. **Attorneys of Record.** — It is well settled that a charging lien may be claimed by the attorney of record,<sup>12</sup> and if several attorneys are employed in a suit by the same party, they are equally entitled to a lien for their compensation on the fruits

<sup>5</sup> *Tedrick v. Hiner*, 61 Ill. 189.

<sup>6</sup> See *supra*, § 23.

<sup>7</sup> In re Benschel, 68 Misc. 70, 124 N. Y. S. 726.

<sup>8</sup> *Mitchell v. Mitchell*, 143 App. Div. 172, 127 N. Y. S. 1065.

And see *supra*, §§ 246-249, as to an attorney's authority in conducting litigation generally.

<sup>9</sup> *Hittson v. Browne*, 3 Colo. 304.

<sup>10</sup> *Dodge v. Schell*, 12 Fed. 515.

<sup>11</sup> *Taylor v. Badoux*, (Tenn.) 58 S. W. 919.

<sup>12</sup> *United States v. McDougall v. Hazelton Tripod Boiler Co.*, 88 Fed. 217, 60 U. S. App. 209, 31 C. C. A. 187.

*Iowa.*—*Gibson v. Chicago, M. & St. P. R. Co.*, 122 Ia. 565, 98 N. W. 474.

*Kansas.*—*Costigan v. Stewart*, 76 Kan. 353, 91 Pac. 83, 11 L.R.A. (N.S.) 630.

*Kentucky.*—*Rowe v. Fogle*, 88 Ky. 105, 10 S. W. 426, 2 L.R.A. 708; *Harlan v. Bennett*, 127 Ky. 572, 106 S. W. 287, 128 Am. St. Rep. 360, 32 Ky. L. Rep. 473; *Brown v. Lapp*, 89 S. W. 304.

*Maine.*—*Howe v. Klein*, 89 Me. 376, 36 Atl. 620.

*Michigan.*—*Voigt Brewery Co. v. Donovan*, 103 Mich. 190, 61 N. W. 343.

of the litigation.<sup>13</sup> Nor is such right to a lien affected by the fact that the suit was commenced by other counsel,<sup>14</sup> or that the lien claimant was styled upon the record merely as "of counsel," where it satisfactorily appears that he had instituted the suit, had control of it at all times, and was recognized as the attorney of record.<sup>15</sup> In some jurisdictions the right to a charging lien is confined to attorneys of record.<sup>16</sup> And so it has been said that the parties to a suit having settled before the defendant's attorney entered an appearance, the attorney had no lien for costs, though he afterwards appeared and answered.<sup>17</sup>

**§ 586. Associate and Assistant Counsel.** — An attorney of record has no power to delegate his authority to another,<sup>13</sup> and, therefore, an associate or assistant counsel employed by the original attorney, without the consent of his client, is not entitled to a charging lien for his services.<sup>19</sup> Of course, where associate counsel are employed by the client, or where the client authorizes or ratifies their employment, a different question is presented; in those cases, counsel so employed are entitled to a lien,<sup>20</sup> or, in some

*Mississippi.*—Halsell *v.* Turner, 84 Miss. 432, 36 So. 531.

*New Hampshire.*—Shapley *v.* Bel-  
lows, 4 N. H. 347.

*New York.*—Kennedy *v.* Carrick,  
18 Misc. 38, 40 N. Y. S. 1127.

<sup>13</sup> Massachusetts & Southern Const.  
Co. *v.* Gill's Creek Tp., 48 Fed. 145.

<sup>14</sup> Stratton *v.* Hussey, 62 Me. 286.

<sup>15</sup> Heavenrich *v.* Alpena Circuit  
Judge, 111 Mich. 163, 69 N. W. 226;  
People *v.* Pack, 115 Mich. 669, 74  
N. W. 185.

<sup>16</sup> Foster *v.* Danforth, 59 Fed. 750;  
In re Robbins, 61 Misc. 114, 112 N.  
Y. S. 1032, affirmed 132 App. Div.  
905, 116 N. Y. S. 1146.

<sup>17</sup> Howard *v.* Riker, 11 Abb. N.  
Cas. (N. Y.) 113.

<sup>18</sup> See *supra*, § 210.

<sup>19</sup> *United States.*—Foster *v.* Dan-  
forth, 59 Fed. 750.

*Colorado.*—Lathrop *v.* Hallett, 20  
Colo. App. 207, 77 Pac. 1095.

*Iowa.*—Gibson *v.* Chicago, M. &  
St. P. R. Co., 122 Ia. 565, 98 N. W.  
474.

*Michigan.*—People *v.* Paek, 115  
Mich. 669, 74 N. W. 185, 4 Detroit  
Leg. N. 1022.

*Missouri.*—Kersey *v.* O'Day, 173  
Mo. 560, 73 S. W. 481; Smith *v.*  
Wright, 153 Mo. App. 719, 134 S.  
W. 683.

*New York.*—Brown *v.* New York, 9  
Hun 587; Phillips *v.* Stagg, 2 Edw.  
108; Kennedy *v.* Carrick, 18 Misc.  
38, 40 N. Y. S. 1127.

<sup>20</sup> Smith *v.* Wright, 153 Mo. App.  
719, 134 S. W. 683; Harwood *v.*  
La Grange, 137 N. Y. 538, 32 N. E.  
1000.

instances, their fees may be included in the lien of the original attorney.<sup>1</sup> So it has been said that an attorney who, though not the attorney of record, virtually had charge of the case with the client's knowledge and consent, and rendered services both as an attorney and as counsel, has a retaining lien, though he does not have a statutory or charging lien.<sup>2</sup> In this connection it would be well to consult the previous discussion of the right of associate and assistant counsel to compensation generally,<sup>3</sup> the amount of such compensation,<sup>4</sup> and also the treatment as to the employment of associate counsel,<sup>5</sup> and the right of the original attorney to retain from funds in his hands a sum sufficient to pay counsel employed by him as associates or assistants.<sup>6</sup>

### *Priority of Lien.*

§ 587. **In General.** — "He who seeks equity must do equity;" and an attorney's charging lien, which is conceded to be of an equitable nature,<sup>7</sup> should not be allowed to take precedence over the existing equitable claims of others.<sup>8</sup> And circumstances may arise whereby, *ex aequo et bono*, a claim originating subsequently to an attorney's contract for compensation, would be entitled to take precedence thereof, as, for instance, one for money advanced to carry on the litigation.<sup>9</sup> This point is well illustrated in a Tennessee case wherein it appeared that "A.'s" land was sold at judicial sale, and that the purchase money was paid and had been applied in discharging "A.'s" debts, and that, subsequently thereto, the sale was declared void, but the purchaser was given a lien on the land for the amount of the purchase money, and it was held that the purchaser's lien was paramount to the lien of the attorney who prosecuted "A.'s" suit.<sup>10</sup> So, an attorney who has been notified of the fact that certain money, received by him

<sup>1</sup> Louisville & N. R. Co. v. Proctor, 51 S. W. 591, 21 Ky. L. Rep. 447.

<sup>2</sup> Harding v. Conlon, 146 App. Div. 842, 131 N. Y. S. 903.

<sup>3</sup> See *supra*, §§ 407-409.

<sup>4</sup> See *supra*, § 444.

<sup>5</sup> See *supra*, § 516.

<sup>6</sup> See *supra*, § 476.

<sup>7</sup> See *supra*, § 581.

<sup>8</sup> Gager v. Watson, 11 Conn. 168; Walker v. Sargeant, 14 Vt. 247.

<sup>9</sup> De Chambrun v. Cox, 60 Fed. 471, 20 U. S. App. 347, 9 C. C. A. 86.

<sup>10</sup> Hays v. Dalton, 5 Lea (Tenn.) 555, overruling Wright v. Dufield, 2 Baxt. (Tenn.) 218.



from a thief, 'was stolen, cannot claim a lien thereon for services subsequently performed for the thief.<sup>11</sup>

Consideration will be given hereafter to the efficacy of an attorney's lien as against the assignments, settlement, etc., of the client, and also as against the right of set-off asserted by persons other than the client,<sup>12</sup> and to the necessity and sufficiency of notice of lien as affecting the rights of third persons.<sup>13</sup>

**§ 588. As against Unsecured Creditors.**—An attorney's charging lien, or other equitable lien in the nature thereof, takes precedence over the unliquidated demands of his client's creditors.<sup>14</sup> And where an attorney acquired a charging lien on a stock of goods which was purchased by the client on credit and through false representations, it was held that the attorney's lien had precedence over the right of the seller to rescind the sale, the attorney having no knowledge of the fraud.<sup>15</sup> Likewise, where a contract with the United States government authorized the latter to withhold payment of part of the contract price in case of failure promptly to pay laborers or materialmen, it was held that, as the contractor alone, and not his creditors, could bring proceedings for the distribution of the fund so withheld, his counsel were, as against the creditors, entitled to compensation out of the fund for bringing such proceedings.<sup>16</sup> So, an attorney's lien on the subject-matter of the litigation conducted by him is superior to the rights of the plaintiff's heirs.<sup>17</sup>

<sup>11</sup> *Wheeler v. King*, 35 Hun (N. Y.) 101. See also *Jeffres v. Cochrane*, 47 Barb. (N. Y.) 557.

<sup>12</sup> See *infra*, §§ 640-652.

<sup>13</sup> See *infra*, § 601.

<sup>14</sup> *Georgia*.—*McDonald v. Napier*, 14 Ga. 89.

*Florida*.—*Carter v. Bennett*, 6 Fla. 214.

*Indiana*.—*Koons v. Beach*, 147 Ind. 137, 45 N. E. 601, 46 N. E. 587.

*Louisiana*.—*Compare Succession of Wells*, 24 La. Ann. 162.

*New York*.—*Pettibone v. Thomson*, 72 Misc. 486, 130 N. Y. S. 284; *Mohawk Bank v. Burrows*, 6 Johns. Ch. 317; *Dunkin v. Vandenberg*, 1 Paige 626; *Nicoll v. Nicoll*, 16 Wend. 446, *overruling* 2 Edw. 574.

*Texas*.—*Randolph v. Randolph*, 34 Tex. 181.

<sup>15</sup> *Meyers v. Bloon*, 20 Tex. Civ. App. 554, 50 S. W. 217.

<sup>16</sup> *Lawrence v. U. S.*, 71 Fed. 228.

<sup>17</sup> *Porter v. Hanson*, 36 Ark. 591.

§ 589. **As against Creditors Armed with Process.**—An attorney's lien upon the judgment is superior to the claim of a creditor in whose favor an execution has been levied,<sup>18</sup> or who has instituted supplementary proceedings.<sup>19</sup> So, an attorney's lien will prevail as against proceedings in attachment, garnishment, and trustee process.<sup>20</sup> And where a party intervenes in an attachment proceeding and claims the attached property, and ultimately obtains an order and judgment for its recovery, or the value thereof, the property having in the meantime been converted into money by order of the court, the proceeds thereof become subject to the attorney's lien.<sup>1</sup>

§ 590. **As against Secured Creditors.**—A lien for attorney's services relates back and takes effect from the time when such services commenced,<sup>2</sup> and it will not be affected by creditors' liens subsequently acquired,<sup>3</sup> excepting in so far as such creditors may have a standing in court for the purpose of attacking its validity.<sup>4</sup> But liens existing prior to the commencement of the rendition of services by the attorney are unaffected,<sup>5</sup> unless perhaps where

<sup>18</sup> *Henry v. Traynor*, 42 Minn. 234, 44 N. W. 11.

<sup>19</sup> *Dienst v. McCaffrey*, 24 Civ. Proc. 238, 32 N. Y. S. 818.

<sup>20</sup> *Hargett v. McCadden*, 107 Ga. 773, 33 S. E. 666; *Harlan v. Bennett*, 127 Ky. 572, 106 S. W. 287, 128 Am. St. Rep. 360, 32 Ky. L. Rep. 473; *Leesville First Nat. Bank v. Martin*, 127 La. 733, 744, 53 So. 973, 977; *Williams v. Ingersoll*, 23 Hun (N. Y.) 284; *Hutchinson v. Howard*, 15 Vt. 544; *Weed Sewing Mach. Co. v. Bontelle*, 56 Vt. 570, 48 Am. Rep. 821; *Parker v. Parker*, 71 Vt. 387, 45 Atl. 756.

<sup>1</sup> *Noftzger v. Moffett*, 63 Kan. 354, 65 Pac. 670.

<sup>2</sup> *Harlan v. Bennett*, 127 Ky. 572, 106 S. W. 287, 128 Am. St. Rep. 360, 32 Ky. L. Rep. 473.

<sup>3</sup> *Justice v. Justice*, 115 Ind. 201,

16 N. E. 615; *Myers v. McHugh* 16 Ia. 335; *Harlan v. Bennett*, 127 Ky. 572, 106 S. W. 287, 128 Am. St. Rep. 360, 32 Ky. L. Rep. 473; *Dameron v. Robertson*, 12 Lea (Tenn.) 372; *Winchester v. Heiskell*, 16 Lea (Tenn.) 556; *Brown v. Bigley*, 3 Tenn. Ch. 618; *Covington v. Bass*, 88 Tenn. 496, 12 S. W. 1033.

<sup>4</sup> *Winchester v. Heiskell*, 16 Lea (Tenn.) 556.

<sup>5</sup> *United States*.—*Finanee Co. of Pennsylvania v. Charleston, C. & C. R. Co.*, 52 Fed. 678.

*Colorado*.—*Teller v. Hill*, 18 Colo. App. 509, 72 Pac. 811.

*District of Columbia*.—*Van Risswick v. Lamon*, 2 MacArthur 172.

*Iowa*.—*Des Moines Gas Co. v. West*, 50 Ia. 16; *Atlee v. Bullard*, 123 Ia. 274, 98 N. W. 889.

*Kentucky*.—*Montgomery v. Garr*,

the attorney's services have worked to the advantage of the prior lien holder;<sup>6</sup> but if the prior lien does not extend to rents and profits, the attorney's lien will attach thereto.<sup>7</sup> So, where a plaintiff recovers judgment upon condition that he pay a certain sum to the defendant, the charging lien of the plaintiff's attorney will attach only to the surplus remaining after deducting the amount which must be paid to the defendant.<sup>8</sup>

**§ 591. Rule in Georgia.**— In Georgia it is provided by statute that attorneys at law shall have a lien upon suits, judgments, and decrees for money, and also upon all suits for the recovery of real or personal property, and upon all judgments or decrees for the recovery thereof, which shall be superior to all liens excepting those for taxes.<sup>9</sup>

*Services and Compensation for Which Lien Exists.*

**§ 592. Taxable Costs.**— In several jurisdictions compensation of counsel was formerly confined to the taxable costs,<sup>10</sup> and an attorney was only entitled to a charging lien for the amount of these costs,<sup>11</sup> excepting where he entered into a special agree-

Scott & Co., 37 S. W. 580, 18 Ky. L. Rep. 607; Morton v. Hallam, 12 S. W. 187, 11 Ky. L. Rep. 447; McAfee v. Rurraek, 1 Ky. L. Rep. 347.

*New York.*—Gates v. De La Mare, 142 N. Y. 307, 37 N. E. 121, *reversing* 66 Hun 626 mem., 20 N. Y. S. 837; Farmers' Loan & Trust Co. v. Westchester County Water Works Co., 143 App. Div. 78, 127 N. Y. S. 569.

*Tennessee.*—Pierce v. Lawrence, 16 Lea 572, 1 S. W. 204.

*Texas.*—Raley v. Hancock, 77 S. W. 658.

*West Virginia.*—Schmertz v. Hammond, 51 W. Va. 408, 41 S. E. 184.

<sup>6</sup> Osborne v. Dunham, (N. J.) 16 Atl. 231; Second Street. 1 Del. Co. Rep. (Pa.) 413.

<sup>7</sup> Wright v. Dufield, 2 Baxt (Tenn.) 218.

<sup>8</sup> Blackburn v. Clarke, 85 Tenn. 506, 3 S. W. 505.

<sup>9</sup> Code of Georgia (1911), Vol. 1, 3364, pars. 2, 3. See also Morrison v. Ponder, 45 Ga. 167; Walton v. Little, 50 Ga. 599; O'Brien v. Whitehead, 75 Ga. 751.

<sup>10</sup> See *supra*, § 485.

<sup>11</sup> *United States.*—Massachusetts & Southern Const. Co. v. Gills' Creek Tp., 48 Fed. 145.

*California.*—Ex p. Kyle, 1 Cal. 331; Mansfield v. Dorland, 2 Cal. 507.

*Illinois.*—Forsythe v. Beveridge, 52 Ill. 268, 4 Am. Rep. 612.

*Maine.*—Hooper v. Brundage, 22 Me. 460; Newbert v. Cunningham, 50 Me. 231, 79 Am. Dec. 612.

ment with his client for a stipulated sum.<sup>12</sup> This was, to a certain extent at least, in accordance with the English practice in so far as it related to the compensation of legal practitioners below the grade of counsel;<sup>13</sup> it will be recalled that counsel, under the English law, were not entitled to claim compensation for their services.<sup>14</sup> At the present day, however, attorneys' fees are not confined to the taxable costs, nor are their liens so limited, in this country.<sup>15</sup>

### § 593. Compensation, Disbursements and Expenses.—

Though the old rule seems to obtain in Massachusetts and perhaps in other jurisdictions,<sup>16</sup> an attorney's charging lien is now ordinarily held to extend not only to the amount of his taxable costs, if any, but also to the compensation, disbursements,<sup>17</sup> and

*Massachusetts*.—*Ocean Ins. Co. v. Rider*, 22 Pick. 210. And see *Blake v. Corcoran*, 211 Mass. 406, 97 N. E. 1002.

*New Hampshire*.—*Shapley v. Belows*, 4 N. H. 347; *Wright v. Cobleigh*, 21 N. H. 339; *Currier v. Boston & M. R. R. Co.*, 37 N. H. 223; *Wells v. Hatch*, 43 N. H. 246; *Rowe v. Langley*, 49 N. H. 395; *Whitecomb v. Straw*, 62 N. H. 650.

*New Jersey*.—*Holmes' Ex'rs v. Sinickson's Devises*, 15 N. J. L. 313.

*New York*.—*Oliwell v. Verdenhalven*, 17 Civ. Proc. 362, 7 N. Y. S. 99; *Phillips v. Stagg*, 2 Edw. 108; *Haight v. Holcomb*, 16 How. Pr. 173; *Richardson v. Brooklyn City & Newton R. Co.*, 24 How. Pr. 321, 15 Abb. Pr. 342 note; *People v. Hardenbergh*, 8 Johns. 335; *Leshner v. Roessner*, 5 Thomp. & C. 674; *Rooney v. Second Ave. R. Co.*, 18 N. Y. 368.

*Rhode Island*.—*Horton v. Champlain*, 12 R. I. 550, 34 Am. Rep. 722; *Tyler v. Superior Court*, 30 R. I. 107, 73 Atl. 467, 23 L.R.A.(N.S.) 1045.

*Texas*.—*Fowler v. Morrill*, 8 Tex. 153; *Casey v. March*, 30 Tex. 180.

*Vermont*.—*Heartt v. Chipman*, 2 Aikens 162; *Walker v. Sargeant*, 14 Vt. 247.

<sup>12</sup> *Stahl v. Wadsworth*, 13 Civ. Proc. 32, 10 N. Y. St. Rep. 228; *Richardson v. Brooklyn City & Newton R. Co.*, 15 Abb. Pr. (N. Y.) 342 note; *Turno v. Parks*, 2 How. Pr. N. S. (N. Y.) 35.

And see also *supra*, § 583.

<sup>13</sup> *England*.—*Wilkins v. Carmichael*, 1 Dougl. 101; *Welsh v. Hole*, 1 Dougl. 238; *Barker v. St. Quintin*, 12 M. & W. 441.

<sup>14</sup> See *supra*, § 401.

<sup>15</sup> See the following section.

<sup>16</sup> *Blake v. Corcoran*, 211 Mass. 406, 97 N. E. 1002.

<sup>17</sup> *United States*.—*In re Wilson*, 12 Fed. 235; *Massachusetts & Southern Const. Co. v. Gill's Creek Tp.*, 48 Fed. 145; *Foster v. Danforth*, 59 Fed. 750.

*Alabama*.—*Warfield v. Campbell*, 38 Ala. 527, 82 Am. Dec. 724.

*Colorado*.—*Fillmore v. Wells*, 10

expenses<sup>18</sup> actually due him<sup>19</sup> for professional services<sup>20</sup> in the cause or proceeding in which such services were rendered,<sup>1</sup> or in any other matter, cause, or proceeding, which is so connected therewith as to, for practical purposes at least, form a part thereof;<sup>2</sup> but not beyond this.<sup>3</sup> And where the amount of the attorney's compensation has not been agreed upon, he will be entitled to a lien for the reasonable value of his services.<sup>4</sup>

**§ 594. Compensation Due in Particular Suit or Proceeding.**—An attorney's right to a charging lien rests solely upon the ground of security for his compensation for services rendered in procuring the judgment, fund, or other property, to which the lien attaches, and it cannot, in the absence of statutory authority, be extended beyond such services,<sup>5</sup> and those necessarily connected

Colo. 228, 15 Pac. 343, 3 Am. St. Rep. 567; *Johnson v. McMillan*, 13 Colo. 423, 22 Pac. 769.

*New York*.—*Ackerman v. Ackerman*, 11 Abb. Pr. 256; *Crotty v. MacKenzie*, 52 How. Pr. 54; *Albert Palmer Co. v. Van Orden*, 64 How. Pr. 79, 49 Super. Ct. 89, 4 Civ. Proc. 44; *Rooney v. Second Ave. R. Co.*, 18 N. Y. 368; *Marshall v. Meech*, 51 N. Y. 140, 10 Am. Rep. 572; *Wright v. Wright*, 70 N. Y. 98; *Anderson v. E. de Brackeleer & Co.*, 25 Misc. 343, 28 Civ. Proc. 306, 55 N. Y. S. 721; *Wheaton v. Newcombe*, 48 Super. Ct. 215.

*Vermont*.—*Weed Sewing Mach. Co. v. Boutelle*, 56 Vt. 570, 48 Am. Rep. 821.

<sup>18</sup> *McDougall v. Hazelton Tripod Boiler Co.*, 88 Fed. 217, 60 U. S. App. 209, 31 C. C. A. 487; *Cooly v. Patterson*, 52 Me. 472; *Heartt v. Chipman*, 2 Aikens (Vt.) 162.

<sup>19</sup> *McCabe v. Britton*, 79 Ind. 224; *Robinson v. Hawes*, 56 Mich. 135, 22 N. W. 222; *Rooney v. Second Ave. R. Co.*, 18 N. Y. 368.

<sup>20</sup> See *infra*, § 596.

<sup>1</sup> See *infra*, § 594.

<sup>2</sup> See *infra*, § 594.

<sup>3</sup> *In re Wilson*, 12 Fed. 235; *Massachusetts & Southern Const. Co. v. Gill's Creek Tp.*, 48 Fed. 145; *Hooper v. Brundage*, 22 Me. 460.

<sup>4</sup> *Crowley v. Le Due*, 21 Minn. 412, *distinguishing* *Forbush v. Leonard*, 8 Minn. 303; *Crotty v. MacKenzie*, 42 Super. Ct. (N. Y.) 192.

<sup>5</sup> *United States*.—*Wolfe v. Lewis*, 19 How. 280, 15 U. S. (L. ed.) 643; *In re Wilson*, 12 Fed. 235, 26 Alb. L. J. 271; *Massachusetts & Southern Const. Co. v. Gill's Creek Tp.*, 48 Fed. 145; *Foster v. Danforth*, 59 Fed. 750; *McDougall v. Hazelton Tripod-Boiler*, 88 Fed. 217, 60 U. S. App. 209, 31 C. C. A. 487.

*Alabama*.—*Warfield v. Campbell*, 38 Ala. 527, 82 Am. Dec. 724; *McWilliams v. Jenkins*, 72 Ala. 480; *Higley v. White*, 102 Ala. 604, 15 So. 141.

*Arkansas*.—*Waters v. Grace*, 23 Ark. 118; *Davis v. Webber*, 66 Ark.

therewith.<sup>6</sup> It does not extend to a claim for a general balance due for professional services in other cases.<sup>7</sup> In some jurisdictions, however, it is expressly provided by statute that a charging lien shall cover any balance due the attorney for professional services.<sup>8</sup> It applies solely to the personal relation between the attorney and his client, and may not be extended to or affect the rights of third persons who may be interested in the litigation, but who have not employed such attorney.<sup>9</sup>

§ 595. **Incidental Services.**—The attorney's charging lien also covers all such professional services as are incidental to the progress of the litigation in which he has been employed,<sup>10</sup> or which are covered by his retainer,<sup>11</sup> and it may include compensation for services rendered in any other case which is so connected with such litigation as to be, practically, a part thereof.<sup>12</sup> It is immaterial that some of the services may have been rendered in

190, 49 S. W. 822, 74 Am. St. Rep. 81, 45 L.R.A. 196.

*Connecticut.*—Sloan *v.* Smith, 77 Conn. 713 mem., 58 Atl. 712.

*Georgia.*—McDonald *v.* Napier, 14 Ga. 89.

*Maine.*—Hooper *v.* Brundage, 22 Me. 460; Prince *v.* Fuller, 34 Me. 122.

*Minnesota.*—Forbush *v.* Leonard, 8 Minn. 303.

*Mississippi.*—Harney *v.* Demoss, 3 How. 174; Dunn *v.* Vannerson, 7 How. 579; Pope *v.* Armstrong, 3 Smedes & M. 214; Cage *v.* Wilkinson, 3 Smedes & M. 223; Stewart *v.* Flowers, 44 Miss. 513, 7 Am. Rep. 707; Halsell *v.* Turner, 84 Miss. 132, 36 So. 531.

*New Hampshire.*—Shapley *v.* Bel-lows, 4 N. H. 347. Compare Wells *v.* Hatch, 43 N. H. 246.

*New York.*—Adams *v.* Fox, 40 Barb. 442; Bowling Green Sav. Bank *v.* Todd, 64 Barb. 146; Brown *v.* New York, 11 Hun 21; Anderson *v.* E. de Brackeler, 25 Misc. 343, 28 Civ.

Proc. 306, 55 N. Y. S. 721; Leask *v.* Hoagland, 64 Misc. 156, 118 N. Y. S. 1035.

*Pennsylvania.*—In re Aber, 18 Pa. Super. Ct. 110.

*West Virginia.*—Renick *v.* Ludington, 16 W. Va. 378; Hazeltine *v.* Keenan, 54 W. Va. 600, 46 S. E. 609, 102 Am. St. Rep. 953.

<sup>6</sup> See the following section.

<sup>7</sup> Pope *v.* Armstrong, 3 Smedes & M. (Miss.) 214.

<sup>8</sup> Fillmore *v.* Wells, 10 Colo. 228, 15 Pac. 343, 3 Am. St. Rep. 567; Hubbard *v.* Ellithorpe, 135 Ia. 259, 112 N. W. 796, 124 Am. St. Rep. 271.

<sup>9</sup> In re Gillaspie, 190 Fed. 88.

<sup>10</sup> Ward *v.* Craig, 87 N. Y. 550; Canary *v.* Russell, 10 Misc. 597, 24 Civ. Proc. 109, 31 N. Y. S. 291.

<sup>11</sup> In re Paschal, 10 Wall. 483, 19 U. S. (L. ed.) 992.

<sup>12</sup> Renick *v.* Ludington, 16 W. Va. 378; Fowler *v.* Lewis' Adm'r, 36 W. Va. 112, 14 S. E. 447.

another court,<sup>13</sup> or by other attorneys.<sup>14</sup> Thus where, in pursuance of an agreement, an attorney attended a number of cases for the purpose of attaining a single end, it was held that a judgment recovered in one of such cases was subject to the attorney's charging lien for the services rendered in all of them.<sup>15</sup> So, a charging lien will extend to any suit arising from and incidental to the enforcement of a judgment to which it has attached.<sup>16</sup> And where a client died before judgment, the attorney's charging lien will cover such services as are subsequently rendered in the suit for an administrator who has undertaken to prosecute it.<sup>17</sup> But the mere fact that several suits are connected, and relate to the same matter, is not sufficient to subject a judgment recovered in any one of them, to a lien for services rendered in the others.<sup>18</sup> Where, however, the statute gives a lien from the commencement of an action there is no lien for incidental services in anticipation of an action never begun.<sup>19</sup>

### § 596. Nature of Services and for Whom Rendered. —

A charging lien can accrue only for professional services;<sup>20</sup> the fact that services, not of a professional character, were rendered by an attorney is not sufficient.<sup>1</sup> But where the attorney's employment is not questioned, his right to a charging lien will not be affected by the fact that the services were rendered in the interest of minors,<sup>2</sup> married women,<sup>3</sup> executors and adminis-

<sup>13</sup> *Weaver v. Cooper*, 73 Ala. 518; *Gibson v. Chicago, M. & St. P. R. Co.*, 122 Ia. 565, 98 N. W. 474.

<sup>14</sup> *Gibson v. Chicago, M. & St. P. R. Co.*, 122 Ia. 565, 98 N. W. 474.

<sup>15</sup> *Butchers' Union Slaughter-House & Live Stock Landing Co. v. Crescent City Live Stock Landing & Slaughter-House Co.*, 41 La. Ann. 355, 6 So. 508.

<sup>16</sup> *Newbert v. Cunningham*, 50 Me. 231, 79 Am. Dec. 612.

<sup>17</sup> *Hurlbert v. Brigham*, 56 Vt. 368.

<sup>18</sup> *Massachusetts & Southern Const. Co. v. Gill's Creek Tp.*, 48 Fed. 145; *Williams v. Ingersoll*, 89 N. Y. 508;

*Brown v. New York*, 11 Hun (N. Y.) 21.

<sup>19</sup> *Millis v. Pentelow*, 92 Hun 284, 36 N. Y. S. 906.

<sup>20</sup> *Woods v. Dickinson*, 18 D. C. 301; *Lorillard v. Barnard*, 42 Hun 545, 4 N. Y. St. Rep. 618.

<sup>1</sup> *Holmes v. Bell*, 139 App. Div. 455, 124 N. Y. S. 301, *affirmed* 200 N. Y. 586, 94 N. E. 1094.

<sup>2</sup> *Sears v. Collie*, 148 Ky. 444, 146 S. W. 1117; *Ex p. Smithson*, 108 Tenn. 442, 67 S. W. 864; *Boring v. Jobe*, (Tenn.) 53 S. W. 763.

<sup>3</sup> *In re Springer*, 16 Pittsb. Leg. J. N. S. (Pa.) 363; *Boring v. Jobe*, (Tenn.) 53 S. W. 763.

trators,<sup>4</sup> or insane persons.<sup>5</sup> So, under some statutes an attorney's charging lien will accrue for services rendered in a special proceeding,<sup>6</sup> or in proceedings before an administrative board, as, for instance, a "county board,"<sup>7</sup> or in bastardy proceedings.<sup>8</sup> Where, however, a local statute specifically mentions the services for which a lien will accrue, it has been held, in some jurisdictions, that an attorney is not entitled to a lien for services other than those specified in the statute.<sup>9</sup>

### § 597. As to Court Wherein Services Are Rendered. —

As a rule, a charging lien will accrue only for services rendered in a court of record, because courts not of record have no such equitable control over their judgments as will enable them to adjudicate upon and enforce liens thereon.<sup>10</sup> It has been held that a charging lien will accrue in favor of an attorney for services rendered in a surrogate court,<sup>11</sup> but not for those rendered in a municipal court.<sup>12</sup>

§ 598. Services Rendered for Defendant. — A defendant's attorney acquires no lien on the subject-matter of the litigation merely because of his employment, and the rendition of professional services in pursuance thereof, even though he should successfully resist the plaintiff's demands;<sup>13</sup> but, in most jurisdic-

<sup>4</sup> *Matter of Scherer*, 111 App. Div. 23, 35 Civ. Proc. 314, 97 N. Y. S. 171.

<sup>5</sup> *In re Stenton*, 53 Misc. 515, 105 N. Y. S. 295.

<sup>6</sup> *New York Judiciary Law*, § 475.

<sup>7</sup> *Maloney v. Douglas County*, 2 Neb. (unofficial) Rep. 396, 89 N. W. 248; *Perry v. Myer*, 89 N. Y. S. 347.

<sup>8</sup> *Bickford v. Ellis*, 50 Me. 121; *Taylor v. Stull*, 79 Neb. 295, 112 N. W. 577.

<sup>9</sup> *Rodgers v. Hamilton*, 49 Ga. 604; *Haygood v. Dannenberg Co.*, 102 Ga. 24, 29 S. E. 293.

<sup>10</sup> *Flinn v. Van Dusen*, 26 Hun (N. Y.) 606; *Read v. Jocelyn*, *Sheld.*

(N. Y.) 60. And see *McCaa v. Grant*, 43 Ala. 262.

<sup>11</sup> *In re Regan*, 167 N. Y. 338, 60 N. E. 658, *reversing* 58 App. Div. 1, 31 Civ. Proc. 387, 68 N. Y. S. 527.

<sup>12</sup> *Drago v. Smith*, 92 Hun 536, 36 N. Y. S. 975; *People v. Fitzpatrick*, 35 Misc. 456, 71 N. Y. S. 191. See, however, *Tynan v. Mart*, 53 Misc. 49, 103 N. Y. S. 1033.

<sup>13</sup> *Kentucky*.—*Wilson v. House*, 10 Bush 406; *Forrester v. Howard*, 124 Ky. 215, 98 S. W. 984, 124 Am. St. Rep. 394, 30 Ky. L. Rep. 375; *Harlan v. Bennett*, 127 Ky. 572, 106 S. W. 287, 128 Am. St. Rep. 360, 32 Ky. L. Rep. 473; *Thompson v. Thompson*,



tions, the defendant's attorney is entitled to a charging lien where he successfully establishes a counterclaim, or procures other affirmative relief, to the fruits of which the lien may attach,<sup>14</sup> and this lien has been held to attach to a judgment for costs in favor of the defendant, though no counterclaim was asserted in the answer.<sup>15</sup> And, under a Kentucky statute, it has been held that the word "action" embraces a demand for a set-off or counterclaim.<sup>16</sup> But a claim, set up by a defendant, which only goes toward reducing the amount of the plaintiff's recovery, is not a counterclaim as to which a lien may be acquired.<sup>17</sup> Thus, an attorney for an administrator who, on the accounting, has defeated a claim to the effect that certain property belonged to the estate, is not entitled to a lien for his services.<sup>18</sup>

**§ 599. Extent of Retaining Lien.** — A retaining lien,<sup>19</sup> contrary to the principles stated in the preceding sections of this

65 S. W. 457, 23 Ky. L. Rep. 1535; *Lytle v. Bach*, 93 S. W. 608, 29 Ky. L. Rep. 424.

*New York*.—*Minto v. Baur*, 17 Civ. Proc. 314, 6 N. Y. S. 444; *Levis v. Burke*, 51 Hun 71 mem., 3 N. Y. S. 386; *Longyear v. Carter*, 88 Hun 513, 2 N. Y. Ann. Cas. 192, 34 N. Y. S. 785; *White v. Sumner*, 16 App. Div. 70, 44 N. Y. S. 692; *Saranac & Lake Placid R. Co. v. Arnold*, 37 Misc. 514, 75 N. Y. S. 1003, *affirmed* 72 App. Div. 620, 76 N. Y. S. 1032; *Fromme v. Union Surety & Guaranty Co.*, 39 Misc. 105, 78 N. Y. S. 895.

*Oregon*.—*Ford v. Gilbert*, 44 Ore. 259, 75 Pac. 138.

*Tennessee*.—*Garner v. Garner*, 1 Lea 29; *Sharp v. Fields*, 5 Lea 326; *In re New Memphis Gaslight Co.*, 105 Tenn. 268, 60 S. W. 206, 80 Am. St. Rep. 880; *Pate v. Maples*, 43 S. W. 740.

*West Virginia*.—*Fowler v. Lewis' Adm'r*, 36 W. Va. 112, 14 S. E. 447.

*Wisconsin*.—*Garvin v. Crowley*, 116 Wis. 496, 93 N. W. 470.

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<sup>14</sup> *Fry v. Calder*, 74 Ga. 7; *New York Judiciary Law*, § 475. See also *Bevins v. Albro*, 86 Hun 590, 33 N. Y. S. 1079; *White v. Sumner*, 16 App. Div. 70, 44 N. Y. S. 692; *In re Opening of Lexington Ave.*, 30 App. Div. 602, 52 N. Y. S. 203, *affirmed* 157 N. Y. 678, 51 N. E. 1092; *Horn v. Horn*, 115 App. Div. 292, 100 N. Y. S. 790; *Crossman v. Smith*, 116 App. Div. 791, 102 N. Y. S. 18; *Gildersleeve v. Reitz*, 80 Misc. 685, 142 N. Y. S. 674.

<sup>15</sup> *Agricultural Ins. Co. v. Smith*, 112 App. Div. 840, 35 Civ. Proc. 338, 98 N. Y. S. 347.

<sup>16</sup> *Harlan v. Bennett*, 127 Ky. 572, 106 S. W. 287, 128 Am. St. Rep. 360, 32 Ky. L. Rep. 473.

<sup>17</sup> *Pierson v. Safford*, 30 Hun (N. Y.) 521.

<sup>18</sup> *In re Robinson*, 125 App. Div. 424, 109 N. Y. S. 827, *affirmed* 192 N. Y. 574, 85 N. E. 1115.

<sup>19</sup> See *supra*, § 573.

subdivision, covers not only such compensation as may be due for services rendered in connection with the property in the possession of the attorney, and to which the lien has attached, but also extends so as to secure the payment of any general balance due the attorney for professional services.<sup>20</sup> Thus, an attorney who was regularly employed at a fixed salary, may have a retaining lien, upon the papers of the client, for the full amount of his salary which is unpaid.<sup>1</sup> So, where a judgment is assigned to counsel as security for fees and expenses, his lien covers services rendered in the collection of the judgment, as well as those in obtaining it.<sup>2</sup> Nor is the attorney's right to a retaining lien affected by the fact that his services were rendered at the request of an agent,<sup>3</sup> or an executor.<sup>4</sup>

<sup>20</sup> *England*.—*Bozon v. Bolland*, 4 Myl. & C. 354.

*United States*.—*In re Pasehal*, 10 Wall. 483, 19 U. S. (L. ed.) 992; *In re Wilson*, 12 Fed. 235; *Foster v. Danforth*, 59 Fed. 750.

*District of Columbia*.—*Meloy v. Meloy*, 24 App. Cas. 239.

*Louisiana*.—*Butchers' Union Slaughter-House & Live Stock Landing Co. v. Crescent City Live Stock Landing & Slaughter-House Co.*, 41 La. Ann. 355, 6 So. 508.

*Michigan*.—*Robinson v. Hawes*, 56 Mich. 135, 22 N. W. 222.

*Minnesota*.—*Washington County v. Clapp*, 83 Minn. 512, 86 N. W. 775.

*Mississippi*.—*Stewart v. Flowers*, 44 Miss. 513, 7 Am. Rep. 707.

*Nebraska*.—*Cones v. Brooks*, 60 Neb. 698, 84 N. W. 85.

*New Hampshire*.—*Dennett v. Cutts*, 11 N. H. 163; *Wright v. Cobleigh*, 21 N. H. 339.

*New York*.—*Adams v. Fox*, 40 Barb. 442; *Bowling Green Sav. Bank v. Todd*, 52 N. Y. 489; *Matter of H.*, 87 N. Y. 521; *Ward v. Craig*, 87 N. Y. 550; *Schwartz v. Jenney*, 21 Hun 33; *Lorillard v. Barnard*, 42

Hun 545, 4 N. Y. St. Rep. 618; *Krone v. Klotz*, 3 App. Div. 587, 25 Civ. Proc. 320, 3 N. Y. Am. Cas. 36, 38 N. Y. S. 225; *Arkenburgh v. Little*, 49 App. Div. 636, 64 N. Y. S. 742, *affirmed* 176 N. Y. 551, 68 N. E. 1114; *Mathot v. Triebel*, 98 App. Div. 328, 90 N. Y. S. 903.

*Tennessee*.—*McDonald v. Charleston, C. & C. R. Co.*, 93 Tenn. 281, 24 S. W. 252.

*Vermont*.—*Hutchinson v. Howard*, 15 Vt. 544; *Weed Sewing Mach. Co. v. Boutelle*, 56 Vt. 570, 48 Am. Rep. 821.

<sup>1</sup> *Finance Co. of Pennsylvania v. Charleston, C. & C. R. Co.*, 46 Fed. 426; *Finance Co. of Pennsylvania v. Charleston C. & C. R. Co.*, 52 Fed. 526.

<sup>2</sup> *Com. v. Terry*, 11 Pa. Super. Ct. 547.

<sup>3</sup> *Jackson v. Erkins*, 131 App. Div. 801, 116 N. Y. S. 385.

<sup>4</sup> *Meloy v. Meloy*, 24 App. Cas. (D. C.) 239; *Matter of Scherer*, 111 App. Div. 23, 35 Civ. Proc. 314, 97 N. Y. S. 171; *In re Ross*, 123 App. Div. 74, 107 N. Y. S. 899; *Arkenburgh v. Arkenburgh*, 27 Misc. 760, 59 N. Y. S. 612, *affirmed* 49 App. Div. 636

But the attorney's lien on property in his possession extends only to his client's interest therein.<sup>5</sup>

### *Notice of Lien.*

§ 600. **Necessity of Notice.**—In the absence of statutory authority to the contrary, it is essential that an attorney should give to the opposite party, and such other persons as may be affected, notice of the fact that he claims a lien for his services, in order to protect himself against settlement by the parties,<sup>6</sup> or an assignment of the judgment or other property involved,<sup>7</sup> or attachments or garnishment proceedings.<sup>8</sup> And when notice has

mem., 64 N. Y. S. 742, 176 N. Y. 551, 68 N. E. 1114; Hurlbert v. Brigham, 56 Vt. 368.

<sup>5</sup>Jackson v. American Cigar Box Co., 141 App. Div. 195, 126 N. Y. S. 58.

<sup>6</sup>United States.—Kern v. Chicago, M. & P. S. R. Co., 201 Fed. 404.

Colorado.—Boston & Colorado Smelting Co. v. Pless, 9 Colo. 112, 10 Pac. 652; Johnson v. McMillan, 13 Colo. 423, 22 Pac. 769; State Bank v. Davidson, 7 Colo. App. 91, 42 Pac. 687; Teller v. Hill, 18 Colo. App. 509, 72 Pac. 811.

Connecticut.—Andrews v. Morse, 12 Conn. 444, 31 Am. Dec. 752.

District of Columbia.—Bendheim v. Pickford, 31 App. Cas. 488.

Indiana.—Koons v. Beach, 147 Ind. 137, 45 N. E. 601, 46 N. E. 387.

Iowa.—Casar v. Sargeant, 7 Ia. 317; Hurst v. Sheets, 21 Ia. 501.

Nebraska.—Cobbey v. Dorland, 50 Neb. 373, 69 N. W. 957; Cones v. Brooks, 60 Neb. 698, 84 N. W. 85.

New Hampshire.—Grant v. Hazeltine, 2 N. H. 541.

New Jersey.—Barnes v. Taylor, 30 N. J. Eq. 467; Braden v. Ward, 42 N. J. L. 518.

Oregon.—Day v. Larsen, 30 Ore. 247, 47 Pac. 101; Stoddard v. Lord, 36 Ore. 412, 59 Pac. 710; Stearns v. Wollenberg, 51 Ore. 88, 92 Pac. 1079, 14 L.R.A.(N.S.) 1095; Wagner v. Goldschmidt, 51 Ore. 63, 93 Pac. 689.

South Dakota.—Howard v. Ward, 139 N. W. 771.

Vermont.—Heartt v. Chipman, 2 Aikens 162; Hooper v. Welch, 43 Vt. 169, 5 Am. Rep. 267; Manning v. Leighton, 65 Vt. 84, 26 Atl. 258, 24 L.R.A. 684.

West Virginia.—Renick v. Ludington, 16 W. Va. 378; Bent v. Lipscomb, 45 W. Va. 183, 31 S. E. 907, 72 Am. St. Rep. 815.

Wisconsin.—Courtney v. McGavock, 23 Wis. 619; Voell v. Kelly, 64 Wis. 504, 25 N. W. 536; Frei v. McMurdy, 101 Wis. 423, 77 N. W. 915; Stanley v. Bouck, 107 Wis. 225, 83 N. W. 298.

Canada.—De Santis v. Canadian Pac. R. Co., 14 Ont. L. Rep. 108.

<sup>7</sup>Jennings v. Bacon, 84 Ia. 403, 51 N. W. 15. Compare Renick v. Ludington, 16 W. Va. 378. See also *infra*, §§ 648, 649.

<sup>8</sup>Phillips v. Germon, 43 Ia. 101.

been given, it is sufficient, as a rule, for services to be rendered thereafter, as well as those which have been rendered.<sup>9</sup> In some jurisdictions, however, an attorney's charging lien is effective without notice;<sup>10</sup> and in others, notice is required only as against third persons.<sup>11</sup> But even in those jurisdictions, it seems that notice of lien is necessary where the lien asserted is not provided for by the statute.<sup>12</sup> Questions of the character under discussion, depending as they do, in most instances, on local statutes, which are frequently amended to meet existing conditions, can only be satisfactorily disposed of by an examination of the state laws under which the lien is claimed. It is essential, of course, that the statu-

*Compare* *Hutchinson v. Howard*, 15 Vt. 544; *Weed Sewing Mach. Co. v. Boutelle*, 56 Vt. 570, 48 Am. Rep. 821. See also *supra*, § 589.

<sup>9</sup>*Smith v. Chicago, R. I. & P. R. Co.*, 56 Ia. 720, 10 N. W. 244. See also *In re Bailey*, 4 Civ. Proc. (N. Y.) 140.

<sup>10</sup>*Georgia*.—*Burgin & Sons Glass Co. v. McIntire*, 7 Ga. App. 755, 68 S. E. 490.

But not before process or other notice of suit. *Lumpkin v. Louisville & N. R. Co.*, 136 Ga. 135, 70 S. E. 1101.

*Kentucky*.—*Tyler v. Slemp*, 90 S. W. 1041, 28 Ky. L. Rep. 959.

*Maine*.—*Hobson v. Watson*, 34 Me. 20, 56 Am. Dec. 632; *Newbert v. Cunningham*, 50 Me. 231, 79 Am. Dec. 612; *McKenzie v. Wardwell*, 61 Me. 136; *Stratton v. Hussey*, 62 Me. 286.

*Minnesota*.—*Desaman v. Butler*, 114 Minn. 362, 131 N. W. 463.

*Missouri*.—See *Missouri Rev. Stat.* (1909) § 965; *Taylor v. St. Louis Transit Co.*, 198 Mo. 715, 97 S. W. 155; *Taylor v. St. Louis Merchants' Bridge Terminal R. Co.*, 207 Mo. 195, 105 S. W. 740; *Whitwell v. Aurora*, 139 Mo. App. 597, 123 S. W. 1045.

*New York*.—*Custer v. Greenpoint*

*Ferry Co.*, 98 N. Y. 660, 5 Civ. Proc. 146; *Peri v. New York Cent. & H. R. R. Co.*, 152 N. Y. 521, 46 N. E. 849; *Quinlan v. Birge*, 43 Hun 483, 7 N. Y. St. Rep. 147; *Keeler v. Keeler*, 51 Hun 505, 4 N. Y. S. 580; *Agricultural Ins. Co. v. Smith*, 112 App. Div. 840, 35 Civ. Proc. 338, 98 N. Y. S. 347; *Webb v. Parker*, 130 App. Div. 92, 114 N. Y. S. 489; *Vrooman v. Pickering*, 25 Misc. 277, 57 N. Y. S. 389; *Dolliver v. American Swan Boat Co.*, 32 Misc. 264, 65 N. Y. S. 978; *Fenwick v. Mitchell*, 34 Misc. 617, 70 N. Y. S. 667, *reversed* 64 App. Div. 621, 72 N. Y. S. 1102; *Dimick v. Cooley*, 3 Civ. Proc. 141; *Moloughney v. Kavanagh*, 3 Civ. Proc. 253; *Stahl v. Wadsworth*, 13 Civ. Proc. 32, 10 N. Y. St. Rep. 228; *Kehoe v. Miller*, 10 Abb. N. Cas. 393 note; *Albert Palmer Co. v. Van Orden*, 64 How. Pr. 79; *Tullis v. Bushnell*, 65 How. Pr. 465; *Peri v. New York Cent. & H. R. R. Co.*, 152 N. Y. 521, 46 N. E. 849, *affirming* 12 App. Div. 625, 43 N. Y. S. 1162.

<sup>11</sup>*Clark v. Sullivan*, 3 N. D. 280, 55 N. W. 733.

<sup>12</sup>*Lablache v. Kirkpatrick*, 8 Civ. Proc. (N. Y.) 256.

tory requirements should be complied with in all cases.<sup>13</sup> It is also to be observed that the requirements as to notice are intended only to protect those who act in good faith; they cannot be taken advantage of for the purpose of shielding fraud or collusion.<sup>14</sup>

**§ 601. Sufficiency of Notice Generally.**—Unless required by statute, no special formalities are essential in giving notice of an attorney's charging lien; any actual notice, oral or written, to those who are to be affected by the lien, will serve the purpose. And where the character of the notice, and the manner of its service, are prescribed by statute, a substantial compliance therewith will, as a rule, be sufficient.<sup>15</sup> It need not state the details of the attorney's employment.<sup>16</sup> Indeed, in some jurisdictions, it has been held that the pendency of the suit or proceeding is, in itself, a sufficient notice to all persons.<sup>17</sup> But a notice to the effect that an attorney has a lien on the cause of action, as security for his fees, is not sufficient to charge the defendant with notice of an assignment to the attorney of an interest in the cause of

<sup>13</sup> *Nielsen v. Albert Lea*, 91 Minn. 388, 392, 98 N. W. 195, 197; *Hull v. Phillips*, 128 Mo. App. 247, 107 S. W. 21.

<sup>14</sup> *Porter v. Hanson*, 36 Ark. 591, 604.

<sup>15</sup> *Iowa*.—*Barthell v. Chicago, M. & St. P. R. Co.*, 138 Ia. 688, 116 N. W. 813; *Crosby v. Hatch*, 135 N. W. 1079.

*Minnesota*.—*Northrup v. Hayward*, 102 Minn. 307, 12 Ann. Cas. 341, 113 N. W. 701.

*Missouri*.—*Abbott v. United Rys. Co.*, 138 Mo. App. 530, 119 S. W. 964.

*Nebraska*.—*Cobbey v. Dorland*, 50 Neb. 373, 69 N. W. 951; *Cones v. Brooks*, 60 Neb. 698, 84 N. W. 85; *Lewis v. Omaha St. R. Co.*, 114 N. W. 281.

*North Dakota*.—*Lown v. Casselman*, 141 N. W. 73.

*Vermont*.—*Lake v. Ingham*, 3 Vt. 158.

*West Virginia*.—*Renick v. Ludington*, 16 W. Va. 378.

<sup>16</sup> *Cheshire v. Des Moines City R. Co.*, 153 Ia. 88, 133 N. W. 324.

<sup>17</sup> *Georgia*.—*Little v. Sexton*, 89 Ga. 411, 15 S. E. 490, *distinguishing* *Haynes v. Perry*, 76 Ga. 33.

*Kentucky*.—*Stephens v. Farrar*, 4 Bush 13.

*Missouri*.—*Taylor v. St. Louis Transit Co.*, 198 Mo. 715, 97 S. W. 155; *Whitecotton v. St. Louis & H. R. Co.*, 250 Mo. 624, 157 S. W. 776; *Langhlin v. Excelsior Powder Mfg. Co.*, 153 Mo. App. 508, 134 S. W. 116.

*Nebraska*.—*Greek v. McDaniel*, 68 Neb. 569, 94 N. W. 518.

*Tennessee*.—*Hunt v. McClanahan*, 1 Heisk. 503; *Vaughn v. Vaughn*, 12 Heisk. 472; *Brown v. Bigley*, 3 Tenn. Ch. 318.

action.<sup>18</sup> Nor will a notice, by plaintiff's attorney, to the effect that "a portion of whatever may be paid in suit or settlement for services to be rendered" had been assigned to him, be sufficient to charge the fund in the hands of the defendant.<sup>19</sup>

**§ 602. Notice Presumed.** — In some jurisdictions it has been held that notice of an attorney's charging lien may be presumed where the party to be charged therewith has knowledge of facts and circumstances which, in themselves, are sufficient to put him on inquiry.<sup>20</sup> Thus, one may be presumed to have notice where he knew that litigation had been commenced,<sup>21</sup> and that an attorney had been employed in the suit,<sup>1</sup> or where his property has been attached,<sup>2</sup> or where, on the sale of land, provision is made for the satisfaction of liens.<sup>3</sup> So, an attorney's lien which has been perfected is sufficient notice to the judgment debtor of the attorney's claim for compensation in another action which is brought for the purpose of enforcing the judgment.<sup>4</sup> And it has also been held that a defendant who compromises a judgment is conclusively presumed to have known all it contained.<sup>5</sup> But the mere knowledge of an ancillary administrator that a former attorney had rendered certain services, is not sufficient to charge him with notice of a lien therefor.<sup>6</sup>

<sup>18</sup> *Smelker v. Chicago & N. W. R. Co.*, 106 Wis. 135, 81 N. W. 994.

<sup>19</sup> *Pennsylvania Co. v. Thatcher*, 78 Ohio St. 175, 85 N. E. 55.

<sup>20</sup> *United States*.—*Angell v. Bennett*, 1 Spr. 85, 1 Fed. Cas. No. 387.

*Georgia*.—*Whittle v. Tarver*, 75 Ga. 818.

*Maine*.—*Stone v. Hyde*, 22 Me. 318; *Hobson v. Watson*, 34 Me. 20, 56 Am. Dec. 632.

*Michigan*.—*Grand Rapids & I. R. Co. v. Cheboygan Circuit Judge*, 161 Mich. 181, 126 N. W. 56, 137 Am. St. Rep. 495, 17 Detroit Leg. N. 270.

*New Hampshire*.—*Young v. Dearborn*, 27 N. H. 324.

*New York*.—*Wilkins v. Batterman*, 4 Barb. 47.

*Vermont*.—*Weed Sewing Mach. Co. v. Boutelle*, 56 Vt. 570, 48 Am. Rep. 821.

<sup>21</sup> See *supra*, note.

<sup>1</sup> *Gammon v. Chandler*, 30 Me. 152.

<sup>2</sup> *Zentmire v. Brailey*, 89 Neb. 158, 130 N. W. 1047.

<sup>3</sup> *Fry v. Calder*, 74 Ga. 7.

<sup>4</sup> *Stoddard v. Lord*, 36 Ore. 412, 59 Pac. 710.

<sup>5</sup> *Covington v. Bass*, 88 Tenn. 496, 12 S. W. 1033.

<sup>6</sup> *Manning v. Leighton*, 65 Vt. 84, 26 Atl. 258, 24 L.R.A. 684.

§ 603. **Filing or Recording of Lien.** — In order to perfect an attorney's charging lien it is essential, in several states, that it should be filed or recorded in the proceeding,<sup>7</sup> in the court where the judgment is entered;<sup>8</sup> but under some statutes filing or recording is necessary only after judgment.<sup>9</sup> In Georgia the filing of an attorney's lien is necessary as against innocent purchasers, but not as against the client and his general creditors.<sup>10</sup> Of course, a lien need not be filed where filing is not required by statute,<sup>11</sup> and, in such case, it seems that the filing of a lien would not necessarily be notice to the judgment debtor;<sup>12</sup> but it may become notice by proof that it was actually read by him, or by any other person who might be affected thereby.<sup>13</sup> It is usual, however, for attorneys, who obtain a money or property judgment, to have a lien declared on the recovery for their fees, and, where this practice prevails, the courts invariably recognize the right when it is asked. Such practice, and its recognition, must be understood to have a substantial meaning and purpose, and, to a certain extent, embarrass the right of the plaintiff to appropriate the recov-

<sup>7</sup> *Indiana*.—*Alderman v. Nelson*, 111 Ind. 255, 12 N. E. 394, *following* *Day v. Bowman*, 109 Ind. 383, 10 N. E. 126; *Koons v. Beach*, 147 Ind. 137, 45 N. E. 601, 46 N. E. 587.

*Nebraska*.—*Griggs v. White*, 5 Neb. 467; *Elliott v. Atkins*, 26 Neb. 403, 42 N. W. 403.

*Oregon*.—*Wagner v. Goldschmidt*, 51 Ore. 63, 93 Pac. 689.

*Washington*.—*Wooding v. Crain*, 11 Wash. 207, 39 Pac. 442; *Humtulsips Driving Co. v. Cross*, 65 Wash. 636, 118 Pac. 827, 37 L.R.A.(N.S.) 226.

<sup>8</sup> The filing of a lien notice below does not protect against settlement in an appellate court to which the judgment is transferred. *Wooding v. Crain*, 11 Wash. 207, 39 Pac. 442.

<sup>9</sup> *Hubbard v. Ellithorpe*, 135 Ia. 259, 112 N. W. 796, 124 Am. St. Rep.

271; *Clark v. Sullivan*, 3 N. D. 280, 55 N. W. 733; *Hroch v. Aultman & Taylor Co.*, 3 S. D. 477, 54 N. W. 269.

<sup>10</sup> *Coleman v. Austin*, 99 Ga. 629, 27 S. E. 763; *Burgin & Sons Glass Co. v. McIntire*, 7 Ga. App. 755, 68 S. E. 490. See also *Code of Georgia* (1911), § 3364, par. 4, which provides that "if an attorney at law shall file, as provided in section 3353, his assertion claiming lien on property recovered on suit instituted by him, within thirty days after a recovery of the same, then his lien shall bind all persons."

<sup>11</sup> *McCain v. Portis*, 42 Ark. 402.

<sup>12</sup> *Colorado State Bank v. Davidson*, 7 Colo. App. 91, 42 Pac. 687.

<sup>13</sup> *Davidson v. La Plata County*, 26 Colo. 549, 59 Pac. 46.

ery without the consent of the lawyer who rendered him valuable service.<sup>14</sup>

**§ 604. Requirements as to Writing and Stating Amount of Claim.**—Some statutes require that notice of an attorney's charging lien must be in writing.<sup>15</sup> In the absence of such a statutory requirement, however, a written notice is not necessary.<sup>16</sup> And where a statute provides for notice in writing, and also for notice by the filing or recording of the lien, it is optional with the lien claimant which method he shall pursue.<sup>17</sup>

So, also, in some jurisdictions it is necessary that the notice of lien should specify the amount claimed,<sup>18</sup> and, in general terms, for what services.<sup>19</sup> But where an attorney's compensation arises out of an implied contract, it will be sufficient for the notice of lien to fairly inform the party to whom it is directed that a lien is claimed, the nature and character thereof, for what it is claimed, and upon what it is intended to be enforced.<sup>20</sup> So, it has been held that a notice to the effect that an attorney claimed a lien of fifty per cent upon the amount due, or to become due, for services rendered, and to be rendered, is a sufficient compliance with a statutory requirement that the amount claimed be stated in the notice.<sup>1</sup> The fact that the attorney signed the notice in his representative capacity, rather than as an individual, does not render it defective.<sup>2</sup>

<sup>14</sup> *Covington v. Bass*, 88 Tenn. 496, 12 S. W. 1033.

<sup>15</sup> *United States*.—*Patrick v. Leach*, 17 Fed. 476.

*Indiana*.—*Koons v. Beach*, 147 Ind. 137, 45 N. E. 604, 46 N. E. 587.

*Kansas*.—*Kansas Pac. R. Co. v. Thacher*, 17 Kan. 92; *Noftzger v. Mof-fett*, 63 Kan. 354, 65 Pac. 670.

*North Dakota*.—*Clark v. Sullivan*, 3 N. D. 280, 55 N. W. 733.

*South Dakota*.—*Hroch v. Aultman & Taylor Co.*, 3 S. D. 477, 54 N. W. 269.

*Washington*.—*Wooding v. Crain*, 11 Wash. 207, 39 Pac. 442.

<sup>16</sup> *Cones v. Brooks*, 60 Neb. 698, 84 N. W. 85.

<sup>17</sup> *Hroch v. Aultman & Taylor Co.*, 3 S. D. 477, 54 N. W. 269.

<sup>18</sup> *Forbush v. Leonard*, 8 Minn. 303.

<sup>19</sup> *Crosby v. Hatch*, (Ia.) 135 N. W. 1079.

<sup>20</sup> *Crowley v. Le Due*, 21 Minn. 412.

<sup>1</sup> *Barthell v. Chicago, M. & St. P. R. Co.*, 138 Ia. 688, 116 N. W. 813.

<sup>2</sup> *Gibson v. Chicago, M. & St. P. R. Co.*, 122 Ia. 565, 98 N. W. 474.



§ 605. **To Whom Notice Should Be Given.** — Notice of lien should be given to the adverse party, or to any other person whom it is desired to affect thereby, personally,<sup>3</sup> or to the attorney,<sup>4</sup> or authorized agent,<sup>5</sup> of such person. It is allowable, and it would seem to be advisable, to serve notice of an attorney's lien with the original papers in the action.<sup>6</sup> The right of an assignee of a judgment to notice of lien will be considered hereafter.<sup>7</sup>

*Waiver or Loss of Lien.*

§ 606. **In General.** — Excepting in cases of express waiver,<sup>8</sup> an attorney's charging lien will not be deemed to have been waived unless the facts and circumstances show an intention, or will warrant the inference of an intention, on the part of the attorney, to abandon it. Thus, it has been held that an attorney's lien rights

<sup>3</sup> *Smith v. Chicago, R. I. & P. R. Co.*, 56 Ia. 720, 10 N. W. 244; *Kansas Pac. R. Co. v. Thacher*, 17 Kan. 92; *Noftzger v. Moffett*, 63 Kan. 354, 65 Pac. 670; *Young v. Renshaw*, 102 Mo. App. 173, 76 S. W. 701.

<sup>4</sup> *Smith v. Chicago, R. I. & P. R. Co.*, 56 Ia. 720, 10 N. W. 244; *Kansas Pac. R. Co. v. Thacher*, 17 Kan. 92; *Noftzger v. Moffett*, 63 Kan. 354, 65 Pac. 670.

*Compare Young v. Renshaw*, 102 Mo. App. 173, 76 S. W. 701, wherein it was held that the service of notice on the attorney for a party was insufficient under the Missouri statute.

So, it has been held that the service of notice on a member of a law firm, was not sufficient notice to an attorney who, although a member of the firm, was acting as an individual in the suit in connection with which the notice was served. *St. Louis & S. F. R. Co. v. Bennett*, 35 Kan. 395, 11 Pac. 155.

<sup>5</sup> *Smith v. Chicago, R. I. & P. R. Co.*, 56 Ia. 720, 10 N. W. 244; *Abbott v.*

*United Rys. Co.*, 138 Mo. App. 530, 119 S. W. 964.

The person served as "agent" of another must be one upon whom, under the local law, such a service can be made; otherwise, it will be defective. *Lumpkin v. Louisville & N. R. Co.*, 136 Ga. 135, 70 S. E. 1101; *Kansas Pac. R. Co. v. Thacher*, 17 Kan. 92; *Weed Sewing Mach. Co. v. Boutelle*, 56 Vt. 570, 48 Am. Rep. 821.

But where a corporate officer received a notice, served by mail, claiming an attorney's lien, and acted on such notice in seeking a settlement, it waives the objection that the notice was not personally served. *Abbott v. United Rys. Co.*, 138 Mo. App. 530, 119 S. W. 964.

<sup>6</sup> *Smith v. Chicago, R. I. & P. R. Co.*, 56 Ia. 720, 10 N. W. 244.

<sup>7</sup> See *infra*, § 648.

<sup>8</sup> Under some statutes an attorney's lien may be released by giving bond. *Jamison v. Ranck*, 140 Ia. 635, 119 N. W. 76. See also *Armitage v. Sullivan*, 69 Ia. 426, 29 N. W. 399.

are not lost merely because he consented that his client should collect the sum due, and thereafter pay his fees.<sup>9</sup> Nor will a waiver result because the attorney failed to deduct his fees from a portion of the fund collected by him,<sup>10</sup> or because of a dispute with the client as to the amount due,<sup>11</sup> or because the attorney accepted an order to pay over to another whatever might be collected by him for his client,<sup>12</sup> or because of the enactment of a statute under which the judgment debt might be paid to the sheriff.<sup>13</sup> Nor will the lien be lost by the appointment of a receiver,<sup>14</sup> or a guardian,<sup>15</sup> or by delivering over, to a receiver duly appointed, the property on which the lien is claimed, especially where such delivery is accompanied with notice of the lien.<sup>16</sup> So, it has been held that the right to a charging lien will not be affected by the fact that the attorney was employed by the real party in interest, and not by the nominal party appearing of record.<sup>17</sup> The mere fact that a judgment became dormant, and was subsequently revived by other attorneys, will not divest a charging lien.<sup>18</sup> Nor will an attorney's charging lien be destroyed because of his failure to prosecute a suit for its enforcement without additional compensation.<sup>19</sup>

But where the facts and circumstances show an intention on the part of the attorney to waive his lien, they will be given that effect.<sup>20</sup> Thus, a waiver may be predicated on the attorney's

<sup>9</sup> *Farmer v. Stillwater Water Co.*, 108 Minn. 41, 121 N. W. 418.

<sup>10</sup> *Hooper v. Brundage*, 22 Me. 460; *Baker v. Cook*, 11 Mass. 236. *Compare* *German v. Browne*, 137 Ala. 429, 34 So. 985.

<sup>11</sup> *Commercial Telegram Co. v. Smith*, 57 Hun 176, 19 Civ. Proc. 32, 10 N. Y. S. 433.

<sup>12</sup> *Kinsey v. Stewart*, 14 Tex. 457.

<sup>13</sup> *East River Bank v. Kidd*, 13 Abb. Pr. (N. Y.) 337 note.

<sup>14</sup> *Bowling Green Sav. Bank v. Todd*, 64 Barb. (N. Y.) 116.

<sup>15</sup> *State v. District Court*, 30 Mont. 8, 75 Pac. 516.

<sup>16</sup> *Cory v. Harte*, 13 Daly (N. Y.)

147. See also *Matter of Bailey*, 66 How. Pr. (N. Y.) 64.

<sup>17</sup> *McGregor v. Comstock*, 28 N. Y. 237.

<sup>18</sup> *Jenkins v. Stephens*, 60 Ga. 216.

<sup>19</sup> *Fisher v. Mylius*, 62 W. Va. 19, 57 S. E. 276.

<sup>20</sup> *Goodrich v. McDonald*, 112 N. Y. 157, 19 N. E. 649; *Pennsylvania Co. v. Thatcher*, 78 Ohio St. 175, 85 N. E. 55; *Renick v. Ludington*, 16 W. Va. 378.

*The failure to file a bill of particulars* is under an Iowa statute sufficient to warrant the court to order the release of an attorney's lien. *Jamison v. Ranek*, 140 Ia. 635, 119 N. W. 76.

laches,<sup>1</sup> or on the fact that he has taken an assignment of the subject-matter of the litigation and claimed to be the owner thereof.<sup>2</sup> So, an attorney may, by his conduct, estop himself to claim his lien,<sup>3</sup> as, for instance, by his failure to assert it,<sup>4</sup> or by an agreement to follow a particular fund for his compensation.<sup>5</sup> But the fact that an attorney wrote his client stating that he did not wish to impress a lien on a certain fund, but desired a check for the amount of his fees, is not a waiver of his lien.<sup>6</sup>

§ 607. **Satisfaction or Release of Judgment.**—An attorney's charging lien will be deemed to have been waived where the attorney procures the satisfaction of the judgment which was charged with it,<sup>7</sup> or where he consents to the payment of the judgment debt to his client.<sup>8</sup> So, it has been held that where an attorney sent a transcript of judgment to his client in another state for the purpose of having it enforced, the judgment debtor was warranted in paying the entire amount to the client.<sup>9</sup> An attorney may also waive his charging lien by releasing the lien of a judgment on which it exists;<sup>10</sup> but the attorney's lien will not

<sup>1</sup> Fillmore v. Wells, 10 Colo. 228, 15 Pac. 343, 3 Am. St. Rep. 567; McNagney v. Frazer, 1 Ind. App. 98, 27 N. E. 431; Reavey v. Clark, 56 Hun 641 mem., 18 Civ. Proc. 272, 9 N. Y. S. 216; Neill v. Van Wagenen, 54 Super. Ct. (N. Y.) 477; Winans v. Mason, 33 Barb. (N. Y.) 522; Winans v. Mason, 21 How. Pr. (N. Y.) 153; Winans v. Grable, 18 S. D. 182, 99 N. W. 1110.

Compare Stone v. Hyde, 22 Me. 318.

<sup>2</sup> Whitehead v. Jessup, 7 Colo. App. 460, 43 Pac. 1042.

<sup>3</sup> Speer v. Matthews, 78 Ga. 757, 3 S. E. 644; Watters v. Wells, 7 Ga. App. 778, 68 S. E. 450; Falardeau v. Washburn, 199 Mass. 363, 85 N. E. 171; Lawrence v. Townsend, 88 N. Y. 24; McClare v. Lockard, 121 N. Y. 308, 24 N. E. 453, reversing 2 N. Y. S. 646; West v. Bacon, 164 N. Y. 425,

58 N. E. 522, modifying 13 App. Div. 371, 43 N. Y. S. 206.

<sup>4</sup> Kreuzen v. Forty-second St. M. & St. N. Ave. R. Co., 13 N. Y. S. 588; Guild v. Borner, 7 Baxt. (Tenn.) 266.

<sup>5</sup> Teller v. Hill, 18 Colo. App. 509, 72 Pac. 811; Pennsylvania Co. v. Thatcher, 78 Ohio St. 175, 85 N. E. 55.

<sup>6</sup> In re King, 168 N. Y. 53, 60 N. E. 1054.

<sup>7</sup> Cowen v. Boone, 48 Ia. 350.

<sup>8</sup> Goodrich v. McDonald, 112 N. Y. 157, 16 Civ. Proc. 222, 19 N. E. 649, reversing 41 Hun 235, 11 Civ. Proc. 147, 2 N. Y. St. Rep. 144. Compare Farmer v. Stillwater Water Co., 108 Minn. 41, 121 N. W. 418.

<sup>9</sup> Barnabee v. Holmes, 115 Ia. 581, 88 N. W. 1098.

<sup>10</sup> Wishard v. Biddle, 64 Ia. 526, 21 N. W. 15.

be affected by the fact that his client released the lien of the judgment.<sup>11</sup> The payment of the judgment to an associate counsel will usually operate to release the lien of all the attorneys in the case,<sup>12</sup> although under some circumstances this rule has been modified, and the payment to the associate attorney held not to deprive the principal attorney of his lien; but the lien attaches to the funds in the hands of the associate counsel.<sup>13</sup>

**§ 608. Acceptance of Independent Security.** — An attorney who accepts independent security for the payment of his compensation, thereby waives his claim to a charging lien,<sup>14</sup> even though the security so taken should ultimately fail.<sup>15</sup> Thus, it has been held that an attorney's lien becomes merged in a judgment which has been assigned to him.<sup>16</sup> It must clearly appear, however, that the security was taken in discharge of the client's obligation;<sup>17</sup> thus, the lien is not waived by the receipt of a note on the condition that it should constitute payment only when it was actually paid.<sup>18</sup> In some jurisdictions the statutes provide that any person interested may secure the release of an attorney's special or charging lien by filing with the clerk of a court of competent jurisdiction a bond in the amount prescribed by the statute, which is frequently double the amount of the attorney's charges;<sup>19</sup> and after

<sup>11</sup> *Woods v. Verry*, 4 Gray (Mass.) 357; *Mays v. Sanders*, 90 Tex. 132, 37 S. W. 595. And see *Baker v. Cook*, 11 Mass. 236.

<sup>12</sup> *Thompson v. Missouri Pac. R. Co.*, 134 Mo. App. 591, 113 S. W. 1142; *Compher v. Missouri & K. Tel. Co.*, 137 Mo. App. 89, 119 S. W. 493.

<sup>13</sup> *Fuller v. Clemmons*, 158 Ala. 340, 48 So. 101.

<sup>14</sup> *Fulton v. Harrington*, 7 Houst. (Del.) 182, 30 Atl. 856; *Stearns v. Wollenberg*, 51 Ore. 88, 92 Pac. 1079, 14 L.R.A. (N.S.) 1095; *Cantrell v. Ford*, (Tenn.) 46 S. W. 581.

<sup>15</sup> *Fulton v. Harrington*, 7 Houst. (Del.) 182, 30 Atl. 856; *Stearns v.*

*Wollenberg*, 51 Ore. 88, 92 Pac. 1079, 14 L.R.A. (N.S.) 1095.

<sup>16</sup> *Dodd v. Brott*, 1 Minn. 270, 66 Am. Dec. 541; *Bishop v. Garcia*, 14 Abb. Pr. N. S. (N. Y.) 69; *McDonogh v. Sherman*, 138 App. Div. 291, 122 N. Y. S. 1033. Compare *Renick v. Ludington*, 16 W. Va. 378.

<sup>17</sup> *Davis v. Jackson*, 86 Ga. 138, 12 S. E. 299.

<sup>18</sup> *Johnson v. Johnson Railroad Signal Co.*, 57 N. J. Eq. 79, 40 Atl. 193.

<sup>19</sup> *Jamison v. Ranck*, 140 Ia. 635, 119 N. W. 76; *Mosteller v. Holborn*, 21 S. D. 547, 114 N. W. 693.

such a bond is filed the client has full control of the judgment and the fund in the hands of the clerk applicable to its satisfaction.<sup>20</sup>

**§ 609. Bringing Suit for Compensation.**—An attorney's charging lien is waived by bringing suit against his client for his compensation, and reducing his claim to judgment.<sup>1</sup> But the mere fact that an attorney has sued his client, is not sufficient to show a waiver of the attorney's charging lien for compensation for services which were not embraced in the suit.<sup>2</sup>

**§ 610. Abandonment of Cause.**—An attorney who, without cause, abandons the litigation in which he has been retained, thereby waives any right which he may have had to a lien for his services;<sup>3</sup> nor, in such case, can the attorney recover compensation in any other way.<sup>4</sup> Where, however, an attorney is justified in abandoning a cause, he will be entitled to a lien either for the stipulated amount, or the reasonable value of his services, according to the circumstances.<sup>5</sup>

**§ 611. Assignment by Attorney.**—It has been quite generally held that, unlike the retaining lien,<sup>6</sup> a charging lien may be assigned by the attorney, and that such assignment is valid,<sup>7</sup> and

<sup>20</sup> *Jamison v. Ranck*, 140 Ia. 635, 119 N. W. 76.

<sup>1</sup> *Jones v. Muskegon County Circuit Judge*, 95 Mich. 289, 54 N. W. 876; *Wipfler v. Warren*, 163 Mich. 189, 128 N. W. 178, 17 Detroit Leg. N. 905; *Beech v. Canaan*, 14 Vt. 485. See, however, *Crosby v. Hatch*, (Ia.) 135 N. W. 1079.

<sup>2</sup> *Commercial Telegram Co. v. Smith*, 57 Hun 176, 19 Civ. Proc. 32, 10 N. Y. S. 433.

<sup>3</sup> *United States*.—*Hektograph Co. v. Fourl*, 11 Fed. 844.

*Illinois*.—*Morgan v. Roberts*, 38 Ill. 67.

*Massachusetts*.—*White v. Harlow*, 5 Gray 463.

*Mississippi*.—*Stewart v. Flowers*, 44 Miss. 513, 7 Am. Rep. 707.

*New York*.—*In re Dunn*, 205 N. Y. 398, 98 N. E. 914; *Tuck v. Manning*, 53 Hun 455, 17 Civ. Proc. 175, 6 N. Y. S. 140; *Halbert v. Gibbs*, 16 App. Div. 126, 4 N. Y. Ann. Cas. 232, 45 N. Y. S. 113; *Fargo v. Paul*, 35 Misc. 568, 72 N. Y. S. 21.

<sup>4</sup> See *supra*, §§ 453, 558.

<sup>5</sup> *Halbert v. Gibbs*, 16 App. Div. 126, 4 N. Y. Ann. Cas. 232, 45 N. Y. S. 113. See also *Penn v. McGhee*, 6 Ga. App. 631, 65 S. E. 686. And see also *supra*, §§ 453, 558.

<sup>6</sup> See *supra*, § 578.

<sup>7</sup> *Taylor v. Black Diamond Coal Min. Co.*, 86 Cal. 589, 25 Pac. 51;

may be enforced by the assignee.<sup>8</sup> But where an attorney has a charging lien against several joint litigants, it would seem that his right to a lien as against them is indivisible, and, therefore, he cannot assign his claim against some of them only.<sup>9</sup> It has also been held that an attorney is bound to give his client an opportunity to pay the lien, and obtain a release thereof; and that to sell the lien to the adverse party without affording such opportunity, is in fraud of the client's right.<sup>10</sup>

§ 612. **Waiver or Loss of Retaining Lien.** — As a general rule, the lien of an attorney on the papers or other property of his client which comes into his possession, terminates when his client's interest therein terminates.<sup>11</sup> So, possession being essential to a retaining lien,<sup>12</sup> a voluntary surrender of the property will constitute a waiver thereof.<sup>13</sup> A waiver may also result from the fact that the attorney sued for his fees and reduced the claim therefor to judgment,<sup>14</sup> or that he abandoned the business undertaken by him without cause.<sup>15</sup> And where an attorney makes a

*Day v. Bowman*, 109 Ind. 383, 10 N. E. 126; *Sibley v. Pine County*, 31 Minn. 201, 17 N. W. 337; *Leask v. Hoagland*, 64 Misc. 156, 118 N. Y. S. 1035.

*Compare Chappell v. Dann*, 21 Barb. (N. Y.) 17.

<sup>8</sup> *Muller v. New York*, 23 Civ. Proc. 261, 29 N. Y. S. 1096; *Fisher v. Mylius*, 62 W. Va. 19, 57 S. E. 276.

<sup>9</sup> *Mulford v. Hodges*, 10 Hun (N. Y.) 79.

<sup>10</sup> *Taylor v. Young*, 56 Mich. 285, 22 N. W. 799.

<sup>11</sup> *Jackson v. American Cigar Box Co.*, 141 App. Div. 195, 126 N. Y. S. 58.

<sup>12</sup> See *supra*, § 576.

<sup>13</sup> *United States*.—In *re Wilson*, 12 Fed. 235, 26 Alb. L. J. 271.

*Alabama*.—*German v. Browne*, 137 Ala. 429, 34 So. 985.

*Illinois*.—*Nichols v. Pool*, 89 Ill. 491.

*Mississippi*.—*Stewart v. Flowers*, 44 Miss. 518, 7 Am. Rep. 707.

*New Hampshire*.—*Dennett v. Cutts*, 11 N. H. 163.

*New York*.—*Weber v. Werner*, 138 App. Div. 127, 122 N. Y. S. 943.

*Pennsylvania*.—*Dubois's Appeal*, 38 Pa. St. 231, 80 Am. Dec. 478.

*South Dakota*.—*Winans v. Grable*, 18 S. D. 182, 99 N. W. 1110.

*Texas*.—*Casey v. March*, 30 Tex. 184.

*Washington*.—*Gottstein v. Harrington*, 25 Wash. 508, 65 Pac. 753.

*West Virginia*.—*Hazeltine v. Keenan*, 54 W. Va. 600, 46 S. E. 609, 102 Am. St. Rep. 953.

<sup>14</sup> *Jones v. Circuit Judge*, 95 Mich. 289, 54 N. W. 876. And see also *supra*, § 609.

<sup>15</sup> *Commerell v. Poynton*, 1 Swanst. (Eng.) 1; *Hektograph Co. v. Foulr*, 11 Fed. 844; In *re Rieser*, 137 App.

formal declaration of trust in favor of his client, with the statement that he holds property for certain purposes, and in no other way, and that upon the conveyance of such property to such persons as the *cestui que trust* may designate, he will pay over the proceeds of the sale to the latter, he expressly waives any lien he may have had thereon for services rendered as attorney to the *cestui que trust*.<sup>16</sup> But a retaining lien is not lost because the property to which it attached was surrendered under an order of court on the giving of security,<sup>17</sup> or by the surrender of such property to a receiver of the client with written notice of the lien,<sup>18</sup> or because the attorney received a payment on account for his services;<sup>19</sup> nor will the insanity of the client, and the appointment of a guardian, divest the attorney's retaining lien.<sup>20</sup>

Div. 177, 121 N. Y. S. 1070. See also *supra*, § 610.

<sup>16</sup> *West v. Bacon*, 164 N. Y. 425, 58 N. E. 522, *modifying* 13 App. Div. 371, 43 N. Y. S. 206. And see also *infra*, § 619.

<sup>17</sup> See *infra*, § 577.

<sup>18</sup> *Cory v. Harte*, 13 Daly (N. Y.) 147.

<sup>19</sup> *In re Holins*, 197 N. Y. 361, 90 N. E. 997.

<sup>20</sup> *State v. District Court*, 30 Mont. 8, 75 Pac. 516; *Matter of Stenton*, 53 Misc. 515, 105 N. Y. S. 295.

## CHAPTER XXIV.

### RIGHTS AND PROPERTY AFFECTED BY LIEN.

#### *Cause of Action.*

- § 613. Right to Lien on Cause of Action.
- 614. Validity of Statutes Creating Lien.
- 615. Extent of Lien.
- 616. Cause of Action for Personal Tort.
- 617. When Lien Accrues.

#### *Money and Funds.*

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- 627. Lien on Land in Absence of Statute.
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#### *Judgments, Decrees, and Awards.*

- 634. Judgments and Decrees Generally.
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#### *To What Retaining Lien Attaches.*

- 638. Property in Possession.
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*Cause of Action.*

§ 613. **Right to Lien on Cause of Action.** — At common law an attorney was not entitled to a lien on his client's cause of action,<sup>1</sup> although it has been intimated that the court, in its discretion, had the power to protect an attorney in the collection of his fees where the facts warranted such action;<sup>2</sup> thus, in a Pennsylvania case wherein it appeared that the defendant was about to remove or fraudulently transfer his property, a cautionary judgment was entered against him on petition presented in open court. This procedure, however, was taken in the interest of the plaintiff, but it would seem to have some bearing, more or less, according to the local practice, and an attorney's right to a lien under the local laws, on the question under consideration. It is undoubtedly a recognition of the right of the court to take action prior to judgment in the interest of justice.<sup>3</sup>

In several jurisdictions, however, the client's cause of action

<sup>1</sup>*United States.* — *Swanston v. Morning Star Min. Co.*, 13 Fed. 215, 4 McCrary 241; *Sherry v. Oceanic Steam Nav. Co.*, 72 Fed. 565; *In re Baxter*, 154 Fed. 22, 83 C. C. A. 106.

*Arkansas.* — *DeGraffenreid v. St. Louis S. W. R. Co.*, 66 Ark. 260, 50 S. W. 272.

*District of Columbia.* — *Lamont v. Washington & Georgetown R. Co.*, 2 Mackey 502, 47 Am. Rep. 268.

*Louisiana.* — *Smith v. Vicksburg S. & P. R. Co.*, 112 La. 985, 36 So. 826.

*Ohio.* — *Pennsylvania Co. v. Thatcher*, 78 Ohio St. 175, 85 N. E. 55.

*Oregon.* — *Stearns v. Wollenberg*, 51 Ore. 88, 92 Pac. 1079, 14 L.R.A.(N.S.) 1095.

*Utah.* — *Sandberg v. Victor Gold & Silver Min. Co.*, 18 Utah 66, 55 Pac. 74.

<sup>2</sup> "It would appear therefore that, where there is no lien upon the cause

of action, either by contract or by statute, the plaintiff's attorney has no vested right which the court is bound to protect at the request of the attorney; but even then the court may, in its discretion, exercise such arbitrary power, and doubtless will do so, when it can see that, through the exercise of the usual and ordinary powers vested in a court over its judgment as to the form and effect thereof, or as to its satisfaction, it may aid the attorney in the collection of his fees." *Stearns v. Wollenberg*, 51 Ore. 88, 92 Pac. 1079, 14 L.R.A.(N.S.) 1095.

<sup>3</sup> *Seisner v. Blake*, 13 Pa. Co. Ct. 333. See also *Witmer v. Port Trevorton Church*, 17 Pa. Co. Ct. 38; *Pershing v. Iron City & Hammondville Imp. Co.*, 46 Pittsb. L. J. (Pa.) 167. See also *Boogren v. St. Paul City R. Co.*, 97 Minn. 51, 106 N. W. 104, 114 Am. St. Rep. 691, 3 L.R.A.(N.S.) 379.

is now, by legislation, expressly subjected to an attorney's charging lien.<sup>4</sup> These statutes are not retroactive.<sup>5</sup>

§ 614. **Validity of Statutes Creating Lien.**—Statutes of this character do not divest the client of his property or property rights,<sup>6</sup> or of the right to control his litigation,<sup>7</sup> nor fail because the method of enforcing the lien was not provided for.<sup>8</sup> Nor are they

<sup>4</sup> *Georgia*.—*Johnson v. McCurry*, 102 Ga. 471, 31 S. E. 88.

*Iowa*.—*Hubbard v. Ellithorpe*, 135 Ia. 259, 112 N. W. 796, 124 Am. St. Rep. 271.

*Kansas*.—*Kansas Pac. R. Co. v. Thacher*, 17 Kan. 92.

*Kentucky*.—*McIntosh v. Bach*, 110 Ky. 701, 62 S. W. 515.

*Minnesota*.—*Northrup v. Hayward*, 102 Minn. 307, 12 Ann. Cas. 341, 113 N. W. 701.

*Missouri*.—*O'Connor v. St. Louis Transit Co.*, 198 Mo. 622, 8 Ann. Cas. 703, 97 S. W. 150, 115 Am. St. Rep. 495; *Taylor v. St. Louis Transit Co.*, 198 Mo. 715, 97 S. W. 155; *Conkling v. Austin*, 111 Mo. App. 292, 86 S. W. 911; *Bishop v. United Rys. Co.*, 165 Mo. App. 226, 147 S. W. 170.

*Nebraska*.—*Lewis v. Omaha St. R. Co.*, 114 N. W. 281.

*New York*.—*Fischer-Hansen v. Brooklyn Heights R. Co.*, 173 N. Y. 492, 66 N. E. 395; *Cohn v. Polstein*, 41 Misc. 431, 84 N. Y. S. 1072; *In re Robbins*, 61 Misc. 114, 112 N. Y. S. 1032; *Adams v. Niagara Cycle Fittings Co.*, 74 N. Y. S. 485.

*Tennessee*.—*Illinois Cent. R. Co. v. Wells*, 104 Tenn. 706, 59 S. W. 1041; *Tompkins v. Nashville C. & St. L. R. Co.*, 110 Tenn. 157, 72 S. W. 116, 100 Am. St. Rep. 795, 61 L.R.A. 340; *Sidoway v. Jones*, 125 Tenn. 322, 143 S. W. 893.

*Utah*.—Comp. Laws of Utah, § 135.

*Washington*.—*McRea v. Warehime*, 49 Wash. 194, 94 Pac. 924.

As to the effect of settlement without the attorney's consent, see *infra*, §§ 640-645.

<sup>5</sup> *Northrup v. Hayward*, 102 Minn. 307, 12 Ann. Cas. 341, 113 N. W. 701; *Adee v. Adee*, 55 App. Div. 63, 66 N. Y. S. 1101.

<sup>6</sup> *Standidge v. Chicago R. Co.*, 254 Ill. 524, 98 N. E. 963; *Adams v. Niagara Cycle Fittings Co.*, 10 N. Y. Ann. Cas. 401, 74 N. Y. S. 485.

<sup>7</sup> *Illinois Cent. R. Co. v. Wells*, 104 Tenn. 706, 59 S. W. 1041.

"Appellant also assails the statute under consideration on the ground that it deprives persons against whom suits are brought or claims held by attorneys for collection of their constitutional and property right to buy their peace by making contracts of settlement. This argument proceeds upon a false assumption. The statute does not affect the right of the defendants in suits, or persons against whom claims or demands are held for collection, from settling the same, but it requires, after notice, that in making such settlement they shall take into account the attorney's claim for his fees." *Standidge v. Chicago R. Co.*, 254 Ill. 524, 98 N. E. 963.

<sup>8</sup> *Illinois Cent. R. Co. v. Wells*, 104 Tenn. 706, 59 S. W. 1041.

objectionable as special or class legislation,<sup>9</sup> or as impairing the right to a jury trial.<sup>10</sup> Such a law creates a new substantial right in favor of attorneys, and hence is not a remedial statute having a retrospective operation.<sup>11</sup> So, a provision to the effect that the lien created on the cause of action shall not be lost by any settlement between the parties has been held not to restrict or destroy the adverse party's right to contract, or to effect a settlement of the action;<sup>12</sup> nor does such provision deprive him of his rights in the premises without due process of law.<sup>13</sup> And "an act to prevent frauds between attorneys, clients, and defendants, making agreements between attorney and client a lien upon the cause of action," has been held to be constitutional as against objections that it contained more than one subject in its title, and that the title failed to express clearly and sufficiently the subject-matter of the statute.<sup>14</sup> Doubt was expressed in one case as to the validity of these statutes on the theory that they tended to encourage litigation, and, therefore, were antagonistic to sound public policy;<sup>15</sup> but a sufficient answer to this statement is that such statutes are enacted for the benefit of the honorable practitioner, and it is not

<sup>9</sup> *Standidge v. Chicago R. Co.*, 254 Ill. 524, 98 N. E. 963; *O'Connor v. St. Louis Transit Co.*, 198 Mo. 622, 8 Ann. Cas. 703, 97 S. W. 150, 115 Am. St. Rep. 495; *Taylor v. St. Louis Transit Co.*, 198 Mo. 715, 97 S. W. 155; *Wait v. Atchison, T. & S. F. R. Co.*, 204 Mo. 491, 103 S. W. 60; *Taylor v. St. Louis Merchants' Bridge Terminal R. Co.*, 207 Mo. 495, 105 S. W. 740; *White-cotton v. St. Louis & H. R. Co.*, 250 Mo. 624, 157 S. W. 776.

Those who follow the legal profession constitute a class, and laws may be passed applicable only to members of a class where the classification rests upon some disability, attribute, or classification marking them as proper objects for the operation of such special legislation, in any case wherein such local or special legislation, is not expressly forbidden by the

constitution. *Standidge v. Chicago R. Co.*, 254 Ill. 524, 98 N. E. 963.

<sup>10</sup> *Standidge v. Chicago R. Co.*, 254 Ill. 524, 98 N. E. 963; *In re King*, 168 N. Y. 53, 60 N. E. 1054.

<sup>11</sup> *Baker v. Baker*, 258 Ill. 418, 101 N. E. 587.

<sup>12</sup> *O'Connor v. St. Louis Transit Co.*, 198 Mo. 622, 8 Ann. Cas. 703, 97 S. W. 150, 115 Am. St. Rep. 495; *Taylor v. St. Louis Transit Co.*, 198 Mo. 715, 97 S. W. 155. And see *Taylor v. St. Louis Merchants' Bridge Terminal R. Co.*, 207 Mo. 495, 105 S. W. 740.

<sup>13</sup> *O'Connor v. St. Louis Transit Co.*, 198 Mo. 622, 8 Ann. Cas. 703, 97 S. W. 150, 115 Am. St. Rep. 495.

<sup>14</sup> *O'Connor v. St. Louis Transit Co.*, 198 Mo. 622, 8 Ann. Cas. 703, 97 S. W. 150, 115 Am. St. Rep. 495.

<sup>15</sup> *Illinois Cent. R. Co. v. Wells*, 104 Tenn. 706, 59 S. W. 1041.

sufficient to render them objectionable that they may, in some instances, enable disreputable attorneys to commit unprofessional acts. The courts may be trusted to care for these matters.<sup>16</sup>

**§ 615. Extent of Lien.** — The extent of an attorney's charging lien on his client's cause of action must be determined, in each case, from an examination of the local law.<sup>17</sup> The New York judiciary law provides: "From the commencement of an action or special proceeding, or the service of an answer containing a counterclaim, the attorney who appears for a party has a lien upon his client's cause of action, claim or counterclaim, which attaches to a verdict, report, decision, judgment or final order in his client's favor, and the proceeds thereof in whosoever hands they may come."<sup>18</sup> A similar statute has been enacted in Missouri,<sup>19</sup> and in Utah.<sup>20</sup> These laws are not mere practice acts, but they create a right such as will be enforced by federal courts sitting in the state wherein they prevail.<sup>21</sup> The Tennessee act, giving plaintiff's attorney a lien upon the right of action, does not give the attorney any right directly against defendant, but merely to follow plaintiff's right of action; and hence, where defendant paid plaintiff \$75 to compromise litigation, and paid \$75 into court under the agreement for the benefit of plaintiff's attorneys, the attorneys cannot enforce a lien against defendant, on the theory that the litigation was compromised for \$150.<sup>1</sup> A Kentucky statute provides: "Attorneys at law shall have a lien upon all claims or demands . . . put into their hands for suit or collection . . . for the amount of any fee which may have been agreed upon by

<sup>16</sup> *O'Connor v. St. Louis Transit Co.*, 198 Mo. 622, 8 Ann. Cas. 703, 97 S. W. 150, 115 Am. St. Rep. 495.

<sup>17</sup> The variety of statutes which govern the subject-matter under consideration, and the frequency with which such statutes are amended, etc., renders it impracticable to consider specifically those relating to each jurisdiction. The local laws must be examined in these cases. The statutes

considered in the text, however, are deemed to be typical.

<sup>18</sup> N. Y. Judiciary Law, § 475.

<sup>19</sup> *Taylor v. St. Louis Transit Co.*, 198 Mo. 715, 97 S. W. 155.

<sup>20</sup> Comp. Laws of Utah, § 135.

<sup>21</sup> *In re Baxter & Co.*, 154 Fed. 22, 83 C. C. A. 106 (construing N. Y. Code).

<sup>1</sup> Acts 1899, C. 243, § 1; *Sidoway v. Jones*, 125 Tenn. 322, 143 S. W. 893.

the parties.”<sup>2</sup> This statute has been held to embrace a claim to property as well as a demand for the payment of money, and a result obtained by any kind of legal proceeding;<sup>3</sup> and the word “action,” as used therein, includes all proceedings in any court in the state.<sup>4</sup> So, it has been held that the New York statute includes eminent domain proceedings,<sup>5</sup> and proceedings for the opening of a street,<sup>6</sup> or any other special proceeding.<sup>7</sup> It is immaterial that the client acts or sues in a representative capacity.<sup>8</sup> The interest of the attorney, however, depends upon the client’s right to recover; and if the client has no cause of action, he can acquire none by the employment of counsel.<sup>9</sup> Now, as formerly, the plaintiff’s right of action is merged in his judgment when one is rendered, and in the compromise when one is made; and the amount specified in the one or in the other is the measure of the defendant’s liability.<sup>10</sup> So an attorney employed to appeal from a judgment claimed to be inadequate and failing has no lien on the land awarded by such judgment.<sup>11</sup> Likewise, where the interest which the plaintiff, an attorney, sought to recover—under an agreement with an heir to bring the necessary actions to recover her interest in an estate, which was afterwards sold by the heir to the defendant—was her distributive interest as heir, as fixed by law, the attorney could not recover it, under a statute giving an attorney a lien upon his client’s cause of action, which attaches to the judgment in his favor, and which cannot be affected by settlement; the interest not being acquired by the heir by any suit brought by plaintiff, and the only suit brought by him for her being dismissed.<sup>12</sup>

<sup>2</sup> *McIntosh v. Bach*, 110 Ky. 701, 62 S. W. 515.

<sup>3</sup> *McIntosh v. Bach*, 110 Ky. 701, 62 S. W. 515.

<sup>4</sup> *McIntosh v. Bach*, 110 Ky. 701, 62 S. W. 515.

<sup>5</sup> *Wendell v. Binninger*, 132 App. Div. 785, 117 N. Y. S. 616.

<sup>6</sup> *In re Robins*, 61 Misc. 114, 112 N. Y. S. 1032.

<sup>7</sup> See *In re Robbins*, 61 Misc. 114, 112 N. Y. S. 1032.

<sup>8</sup> *In re Ross*, 123 App. Div. 74, 107 N. Y. S. 899.

<sup>9</sup> *Hall v. Lockerman*, 127 Ga. 537, 56 S. E. 759.

<sup>10</sup> *In re Jones*, 76 Misc. 331, 136 N. Y. S. 819; *Sidoway v. Jones*, 125 Tenn. 322, 143 S. W. 893.

<sup>11</sup> *In re Jones*, 76 Misc. 331, 136 N. Y. S. 819.

<sup>12</sup> *Elam v. Bond*, 169 Mo. App. 584, 154 S. W. 880.

§ 616. **Cause of Action for Personal Tort.** — In some jurisdictions it has been held that, in the absence of express statutory authority, an attorney's charging lien will not attach to a cause of action for a personal tort;<sup>13</sup> and it has been so held under a statute which secured to attorneys a lien upon claims arising on contracts, either express or implied.<sup>14</sup> These decisions are usually based upon the common-law doctrine of the nonassignability of causes of action for injuries to the person, or upon the language of local statutes.<sup>15</sup> On the other hand, in many states, a cause of action for tort is held to be subject to an attorney's charging lien<sup>16</sup> from the commencement of the action;<sup>17</sup> nor will such lien be defeated by the settlement of the action prior to judgment.<sup>18</sup> But in other cases, while the right to a charging lien on a cause of action for tort is not denied, it is held that the lien does not attach until a verdict has been recovered, or a judgment has been entered of record;<sup>19</sup> these decisions, it would seem, have the effect of destroying the lien upon the cause of action, and substituting therefor a lien upon the judgment, verdict, or award.<sup>20</sup>

§ 617. **When Lien Accrues.** — As a general rule, the attorney's charging lien attaches to his client's cause of action from the commencement of the suit or proceeding in which he has been retained,<sup>1</sup> or from the time the adverse party had knowledge of

<sup>13</sup> *Boogren v. St. Paul City R. Co.*, 97 Minn. 51, 106 N. W. 104, 114 Am. St. Rep. 691, 3 L.R.A.(N.S.) 379; *Cahill v. Cahill*, 9 Civ. Proc. (N. Y.) 241.

<sup>14</sup> *Wood v. Anders*, 5 Bush (Ky.) 601.

<sup>15</sup> *Anderson v. Itasca Lumber Co.*, 86 Minn. 480, 91 N. W. 12, 291; *Weller v. Jersey City H. & St. P. R. Co.*, 66 N. J. Eq. 11, 57 Atl. 730; *Randall v. Van Wagenen*, 115 N. Y. 527, 22 N. E. 361, 12 Am. St. Rep. 828.

<sup>16</sup> *Smith v. Chicago, R. I. & P. R. Co.*, 56 Ia. 720, 10 N. W. 244; *Kansas Pac. R. Co. v. Thatcher*, 17 Kan. 92; *Lewis v. Omaha St. R. Co.*, (Neb.) 114

N. W. 281, *disapproving* *Abbott v. Abbott*, 18 Neb. 503, 26 N. W. 361; *Astrand v. Brooklyn Heights R. Co.*, 24 Misc. 92, 28 Civ. Proc. 113, 53 N. Y. S. 294.

<sup>17</sup> See the following section.

<sup>18</sup> See *infra*, §§ 640-645.

<sup>19</sup> See the following section.

<sup>20</sup> See *infra*, § 634.

<sup>1</sup> *Georgia*.—*Brown v. Georgia, C. & N. R. Co.*, 101 Ga. 80, 28 S. E. 634.

*Missouri*.—*Taylor v. St. Louis Transit Co.*, 198 Mo. 715, 97 S. W. 155; *Smoot v. Shy*, 159 Mo. App. 126, 139 S. W. 239.

*New York*.—N. Y. Judiciary Law, § 475; *Millis v. Pentelow*, 92 Hun 284,

such commencement by service of process or otherwise,<sup>2</sup> or from notice of the lien;<sup>3</sup> and the right of the defendant's attorney to a lien usually begins with the filing of an answer containing a counterclaim, or setting up any other affirmative defense, the successful outcome of which will result in the retention or acquisition of property, or property rights, to which the lien may attach.<sup>4</sup> In some jurisdictions, however, the lien does not attach until a verdict has been rendered,<sup>5</sup> and in others, the lien only attaches when judgment has been entered of record,<sup>6</sup> unless it is otherwise agreed upon.<sup>7</sup> In Kentucky, the statute provides that the attorney shall have a lien upon all claims or demands "put into his hands for suit or collection."<sup>8</sup> But when the lien once accrues, it relates back to the commencement of the suit or proceeding,<sup>9</sup> and it continues to exist until it has been satisfied or otherwise released.<sup>10</sup>

36 N. Y. S. 906; *In re Albers Realty Co.*, 140 App. Div. 277, 125 N. Y. S. 179; *Keenan v. Dorflinger*, 19 How. Pr. 153; *Shaunessy v. Traphagen*, 13 N. Y. St. Rep. 754.

*Tennessee*.—*Illinois Cent. R. Co. v. Wells*, 104 Tenn. 706, 59 S. W. 1041; *Tompkins v. Nashville, C. & St. L. R. Co.*, 110 Tenn. 157, 72 S. W. 116, 100 Am. St. Rep. 795, 61 L.R.A. 340.

*Utah*.—Comp. Laws of Utah, § 135.

*Prior to the commencement* of the suit or proceeding there is no lien under the New York statute. *In re Albers Realty Co.*, 140 App. Div. 277, 125 N. Y. S. 179; *In re Robbins*, 61 Misc. 114, 112 N. Y. S. 1032, *affirmed* 132 App. Div. 905, 116 N. Y. S. 1146.

<sup>2</sup> *Florida Cent. & P. R. Co. v. Ragan*, 104 Ga. 353, 30 S. E. 745; *Lumpkin v. Louisville & N. R. Co.*, 136 Ga. 135, 70 S. E. 1101; *Desaman v. Butler*, 114 Minn. 362, 131 N. W. 463.

<sup>3</sup> *McRea v. Warehime*, 49 Wash. 194, 94 Pac. 924.

And see *supra*, § 600.

<sup>4</sup> N. Y. Judiciary Law, § 475.

Comp. Laws of Utah, § 135. See also *supra*, § 598.

<sup>5</sup> *Farmer v. Stillwater Water Co.*, 108 Minn. 41, 121 N. W. 418.

<sup>6</sup> *Illinois*.—*Henchey v. Chicago*, 41 Ill. 136.

*Rhode Island*.—*Tyler v. Superior Court*, 30 R. I. 107, 73 Atl. 467, 23 L.R.A.(N.S.) 1045.

*Utah*.—*Sandberg v. Victor Gold & Silver Min. Co.*, 18 Utah 66, 55 Pac. 74.

*Washington*.—*Cline Piano Co. v. Sherwood*, 57 Wash. 239, 106 Pac. 742.

*Wisconsin*.—*Courtney v. McGavock*, 23 Wis. 619.

<sup>7</sup> *Grand Rapids & I. R. Co. v. Cheboygan Circuit Judge*, 161 Mich. 181, 126 N. W. 56, 17 Detroit Leg. N. 270; *Stearns v. Wollenberg*, 51 Ore. 88, 92 Pac. 1079, 14 L.R.A.(N.S.) 1095.

<sup>8</sup> *McIntosh v. Bach*, 110 Ky. 701, 62 S. W. 515. But see *Wood v. Anders*, 5 Bush (Ky.) 601, wherein it was held that an attorney has no lien prior to judgment on a claim for unliquidated damages in cases of tort.

<sup>9</sup> *Winchester v. Heiskell*, 16 Lea (Tenn.) 556.

<sup>10</sup> *Desaman v. Butler*, 114 Minn. 362, 131 N. W. 463.

*Money and Funds.*

§ 618. **Funds in Hands of Adverse Party.**—An attorney had no lien at common law on money owing to his client which was in the hands of the adverse party;<sup>11</sup> but a lien of this character is now provided for in several jurisdictions by legislation.<sup>12</sup> Thus where one working with a third person for a common purpose, employed an attorney who, in the execution of that purpose, created a fund in the hands of the third person, it was held that the fund so created was subject to a lien for the attorney's compensation whether the third person knew of his employment or

<sup>11</sup> *Adams Exp. Co. v. Adams*, 1 MacArthur (D. C.) 642; *Irwin v. Workman*, 3 Watts (Pa.) 357; *Balsbaugh v. Frazer*, 19 Pa. St. 95; *Dubois' Appeal*, 38 Pa. St. 231, 80 Am. Dec. 478; *Quakertown & E. R. Co. v. Guarantors' Liability Indemnity Co.*, 206 Pa. St. 350, 55 Atl. 1033; *Patrick v. Bingaman*, 2 Pa. Super. Ct. 113. See also *Cain v. Hoekensmith Wheel & Car Co.*, 157 Fed. 992. And see *Thomson v. Findlater Hardware Co.*, (Tex.) 156 S. W. 301.

<sup>12</sup> *United States*.—See also *Brown v. Morgan*, 163 Fed. 395.

*Indiana*.—*Koons v. Beach*, 147 Ind. 137, 45 N. E. 601, 46 N. E. 587.

*Iowa*.—*Hurst v. Sheets*, 21 Ia. 501; *Smith v. Chicago, R. I. & P. R. Co.*, 56 Ia. 720, 10 N. W. 244; *Gibson v. Chicago, M. & St. P. R. Co.*, 122 Ia. 565, 98 N. W. 474; *Cheshire v. Des Moines City R. Co.*, 153 Ia. 88, 133 N. W. 324.

*Kansas*.—*Kansas Pac. R. Co. v. Thacher*, 17 Kan. 92; *Holmes v. Waymire*, 73 Kan. 104, 9 Ann. Cas. 624, 84 Pac. 558; *Anderson v. Metropolitan St. R. Co.*, 86 Kan. 179, 119 Pac. 379.

*Kentucky*.—*Johnson v. Breckinridge*, 4 Ky. L. Rep. 994.

*Minnesota*.—*Weicher v. Cargill*, 86 Minn. 271, 90 N. W. 402.

*Michigan*.—*Lindner v. Hine*, 84 Mich. 511, 48 N. W. 43; *Bigelow v. Sheehan*, 161 Mich. 667, 126 N. W. 707, 17 Detroit Leg. N. 422; *Wipfler v. Warren*, 163 Mich. 189, 128 N. W. 178, 17 Detroit Leg. N. 905.

*Missouri*.—*Young v. Renshaw*, 102 Mo. App. 173, 76 S. W. 701; *Conkling v. Austin*, 111 Mo. App. 292, 86 S. W. 911.

*Nebraska*.—*Cones v. Brooks*, 60 Neb. 698, 84 N. W. 85; *Gordon v. Hennings*, 89 Neb. 252, 131 N. W. 228.

*New York*.—*In re Williams*, 187 N. Y. 286, 79 N. E. 1019, *reversing* 107 App. Div. 627, 95 N. Y. S. 1166; *Canary v. Russell*, 10 Misc. 597, 24 Civ. Proc. 109, 31 N. Y. S. 291.

*Washington*.—*McRea v. Warehime*, 49 Wash. 194, 94 Pac. 924.

*Services Rendered outside of the State*.—The Washington statute, which gives an attorney a lien on money in the hands of the adverse party, applies only where there is an action or proceeding pending within the state. *Plummer v. Great Northern R. Co.*, 60 Wash. 214, 110 Pac. 989, 31 L.R.A.(N.S.) 1215.



not.<sup>13</sup> So, it has been held that an attorney employed by the mother of an illegitimate child, to assist in the prosecution of proceedings in bastardy, is entitled to a lien upon the fund recovered.<sup>14</sup> In some jurisdictions it is expressly provided that the attorney shall have a lien on money or funds in the hands of the adverse party, or third persons; and in others it has been held that, even without such a provision, the language of the statute necessitates such a holding. Indeed, charging funds due the client with an attorney's lien would seem to be the natural and logical sequence of those statutes which provide for a lien on the client's cause of action,<sup>15</sup> or on a judgment recovered for the client;<sup>16</sup> and this fact is emphasized by provisions which make the attorney's lien effective notwithstanding the settlement of the matter in dispute by the parties.<sup>17</sup> For, unless the money or fund in the hands of the adverse party, or other person to whom it may come, is subject to the attorney's charging lien on the cause of action, or the judgment, it is evident that, in some instances at least, the lien would be futile—a mere right without a remedy.

Consideration will be given hereafter to funds realized from the disposition of property,<sup>18</sup> or judgments,<sup>19</sup> which were subject to the attorney's lien; and also to funds realized by way of settlement with the client.<sup>20</sup> It has been said, however, that as the lien is in derogation of common law, it will be allowed only when the facts bring the case within the exact terms of the statute.<sup>1</sup>

**§ 619. Funds in Hands of, or Owing to, Executors, Administrators, or Trustees.** — The right of an attorney to a charging lien is not affected by the fact that his client is an executor, administrator, or trustee.<sup>2</sup> So, an attorney will be entitled to a

<sup>13</sup> *Bigelow v. Sheehan*, 161 Mich. 667, 126 N. W. 707, 17 Detroit Leg. N. 422.

<sup>14</sup> *Costigan v. Stewart*, 76 Kan. 353, 91 Pac. 83, 11 L.R.A.(N.S.) 630.

<sup>15</sup> See *supra*, § 613.

<sup>16</sup> See *infra*, § 634.

<sup>17</sup> See *infra*, §§ 640-645.

<sup>18</sup> See *infra*, 626.

<sup>19</sup> See *infra*, § 648.

<sup>20</sup> See *infra*, § 640.

<sup>1</sup> *Kauffman v. Phillips*, 154 Ia. 542, 134 N. W. 575.

<sup>2</sup> *Arkansas*.—*Turner v. Tapscott*, 30 Ark. 312.

*Iowa*.—*Foss v. Cobler*, 105 Ia. 728, 75 N. W. 516.

*Massachusetts*.—*Newell v. West*, 149 Mass. 520, 21 N. E. 954.

charging lien on money in the hands of an executor, administrator, or trustee, for services whereby he recovers a judgment against such persons in a representative capacity, or against the estate which they represent.<sup>3</sup> As a general rule, however, no lien is acquired against the estate of a decedent, or a *cestui que trust*, for services rendered at the instance of those who represent the estate; such services should be paid for in the first instance, and, being so paid, the representative may seek allowance from the estate.<sup>4</sup> It is certain that no lien can accrue against an estate for services rendered for the individual benefit of its representative;<sup>5</sup> nor should a lien be allowed for services rendered in derogation of the rights of legatees and general creditors.<sup>6</sup> So, it has been held that attorneys who were employed to recover damages for personal injuries, are not entitled to compensation out of a fund paid to the executors of their client, who died pending suit, because such fund is in settlement of the damages suffered by the estate, and not those suffered by the decedent.<sup>7</sup>

*Michigan*.—Dennis v. Kent Cir. Judge, 42 Mich. 249, 3 N. W. 950.

*Mississippi*.—Clopton v. Gholson, 53 Miss. 466; Perry-Mason Shoe Co. v. Sykes, 72 Miss. 399, 17 So. 171, 28 L.R.A. 277.

*New York*.—Bowman v. Tallman, 2 Robt. 385; Matter of Knapp, 85 N. Y. 284, *distinguishing* Austin v. Munroe, 47 N. Y. 360; Matter of Williams, 187 N. Y. 286, 79 N. E. 1019; Matter of Holland Trust Co., 76 Hun 323, 27 N. Y. S. 687; Lee v. Van Voorhis, 78 Hun 575, 29 N. Y. S. 571, *affirmed* 145 N. Y. 603, 40 N. E. 164; Gunning v. Quinn, 81 Hun 522, 30 N. Y. S. 1015, *affirmed* 153 N. Y. 659, 48 N. E. 1104; Krone v. Klotz, 3 App. Div. 587, 38 N. Y. S. 225; Matter of King, 61 App. Div. 152, 70 N. Y. S. 356; Matter of Smith, 111 App. Div. 23, 97 N. Y. S. 171; Arkenburgh v. Arkenburgh, 27 Misc. 760, 59 N. Y. S. 612, *affirmed* without opinion 176 N. Y.

551, 68 N. E. 1114; Matter of Crouch, 41 Misc. 349, 84 N. Y. S. 936.

*Pennsylvania*.—Newbaker v. Alricks, 5 Watts 183; Clark's Appeal, 93 Pa. St. 369, *distinguishing* Snyder's Appeal, 54 Pa. St. 67.

*Tennessee*.—Read v. Bostick, 6 Humph. 321.

*Vermont*.—Hurlbert v. Brigham, 56 Vt. 368.

<sup>3</sup> Koons v. Beach, 147 Ind. 137, 45 N. E. 601, 46 N. E. 587.

<sup>4</sup> In re Lamberson, 63 Barb. (N. Y.) 297; Matter of Smith, 111 App. Div. 23, 35 Civ. Proc. 314, 97 N. Y. S. 171. See also In re Memphis Gaslight Co. Cases, 105 Tenn. 268, 60 S. W. 206, 80 Am. St. Rep. 880.

<sup>5</sup> Lawrence v. Townsend, 88 N. Y. 24.

<sup>6</sup> January v. Mansell's Adm'r, 4 Bibb (Ky.) 566; Kerngood v. Jack, 38 Misc. 309, 77 N. Y. S. 865.

<sup>7</sup> In re Carrig's Estate, 36 Misc. 612, 73 N. Y. S. 1123.

**§ 620. Legacies and Distributive Shares.** — That the fund, as against which it is sought to establish a charging lien, constitutes a legacy or distributive share of a decedent's estate, is immaterial. Thus, it has been held that an attorney is entitled to a lien on a legacy due his client for services rendered in the establishment,<sup>8</sup> or setting aside,<sup>9</sup> of a will. So, an attorney's lien will attach to a surplus due to heirs from the proceeds of a sale of a decedent's estate for the payment of debts.<sup>10</sup> An attorney may also maintain a lien on funds, in the hands of an administrator, for services rendered in the collection of assets due the estate, at the request of the sole heir thereof.<sup>11</sup> So, an attorney will be entitled to an equitable lien under an agreement whereby he was to be paid a stipulated fee, contingent upon success, for services rendered in a will contest, "out of the funds secured from the estate."<sup>12</sup> And it has been held that a contract to pay an attorney a stipulated fee "in case the will is defeated and our clients get their shares" will entitle the attorney to an equitable lien where the will which, as previously construed, disinherited such clients, was so qualified that the clients received thereunder a larger proportion of the estate than if the testator had died intestate.<sup>13</sup>

**§ 621. Attached Funds.** — Where funds are attached in an attorney's hands he may, of course, retain therefrom such fees as may be due him, providing he has a lien therefor;<sup>14</sup> but not otherwise.<sup>15</sup> Thus, under a statute which provided for a lien upon money belonging to the client "in the hands of the adverse party in an action or proceeding in which the attorney was employed," it was held that the defendant's attorney was not entitled to a lien

<sup>8</sup> *Fuller v. Cason*, 26 Fla. 476, 7 So. 870.

<sup>9</sup> *Johnson v. Breekinridge*, 4 Ky. L. Rep. 994; *In re Hoyt*, 12 Civ. Proc. 208, 5 Dem. 432, 8 N. Y. St. Rep. 786.

<sup>10</sup> *Read v. Bostick*, 6 Humph. (Tenn.) 321.

<sup>11</sup> *Koons v. Beach*, 147 Ind. 137, 45 N. E. 601, 46 N. E. 587.

<sup>12</sup> *Ingersoll v. Coram*, 211 U. S. 335, 29 S. Ct. 92, 53 U. S. (L. ed.) 208.

<sup>13</sup> *Ingersoll v. Coram*, 211 U. S. 335, 29 S. Ct. 92, 53 U. S. (L. ed.) 208.

<sup>14</sup> See *supra*, § 301.

<sup>15</sup> *Lucas v. Campbell*, 88 Ill. 447; *Raley v. Hancock*, (Tex.) 77 S. W. 658. And see *McDonald v. The Cabot*, Newb. 348, 16 Fed. Cas. No. 8,759.

on funds which the plaintiff had caused to be garnished in the hands of a third party. Said the court: "This money was neither in the hands of the attorney nor in the hands of the adverse party. It was money in the hands of a third party, who, it is true, had been garnished in the action in which Lane was employed, but who was still in possession of the fund. It had never been paid into court, but was held by the garnishee at the request of the attorney of the attaching plaintiff. Even if it had been paid into court, it would not fall within the letter of the statute which gives a lien only upon money in the hands of the attorney himself, or in the possession of the adverse party."<sup>16</sup> Of course, it will be recalled that as to money in his possession, the attorney is entitled to a retaining lien for his compensation.<sup>17</sup>

### § 622. Appropriations and Other Government Funds.—

An attorney's lien for services rendered cannot be asserted against money appropriated to his client by an act of the legislature while such money is in the custody of the state treasurer. Indeed, it may well be doubted if, in any case, an attorney's lien can be successfully asserted against money appropriated by the legislature to any person or corporation, public or private, while in the hands, or under the control, of an officer of the state. It would be contrary to good public policy and detrimental to the due administration of the affairs of the state to permit its officers to be harassed and hindered in the discharge of their duties by parties asserting rights, either by way of attorney's liens, attachments, garnishment proceedings, or otherwise, to such funds.<sup>18</sup> Thus, it has been held that money appropriated by the legislature to reimburse an election contestant for his expenses, is not subject to an attorney's

<sup>16</sup> *Phillips v. Hogue*, 63 Neb. 192, 88 N. W. 180.

<sup>17</sup> See *infra*, § 638. And see also *supra*, §§ 537-577.

<sup>18</sup> *State v. Moore*, 40 Neb. 854, 59 N. W. 755, 25 L.R.A. 774.

*Claims against United States.*—Under U. S. Rev. Stats., § 3477 (2 Fed. St. Ann. 7), providing that all transfers and assignments of claims

upon the United States shall be void unless made with certain formalities, it has been held that no lien on a judgment against the United States exists by implication in favor of an attorney for prosecuting the same under a special agreement for an interest therein. *Manning v. Leighton*, 65 Vt. 84, 26 Atl. 258, 24 L.R.A. 684.

charging lien.<sup>19</sup> Nor does a statute giving an attorney a lien on claims put in his hands for collection, authorize the retention of money collected for the state, where it is also provided by law that all public moneys shall be paid into the state treasury.<sup>20</sup> So, it has been held that, in the absence of legislative authority, the governor of a state has no power to employ counsel to represent the state so as to entitle such counsel to a statutory lien for his compensation.<sup>1</sup> And it has also been held that where a party undertakes, on behalf of himself and other taxpayers of a county, to prevent the illegal expenditure of money, or to recover money illegally expended, he cannot, without direct statutory authority, expect his attorneys to be paid by the county. The sum expended by him is simply a contribution made towards good government, and he must find his recompense in the conviction that he has performed his duty as a citizen; and an attorney who undertakes such employment must look alone to the taxpayer who employed him.<sup>2</sup>

§ 623. **Money Paid into Court.**—In several jurisdictions wherein the right of an attorney to a charging lien for his services is recognized, either as a matter of general law or by legislation, money or funds paid into court as the result of the attorney's services will be charged with a lien for his compensation.<sup>3</sup> Notice of an application to withdraw a fund from court should be given to an attorney who has a lien upon it;<sup>4</sup> and where a fund so charged has been withdrawn from the court in fraud of the attorney's rights with respect thereto, the court has power to recall it, upon a satisfactory showing that the withdrawal was irregular.<sup>5</sup> But it has been held, in those states which do not recognize a charging lien, that the mere fact that money has been paid into

<sup>19</sup> *Hallam v. Coulter*, 115 Ky. 313, 73 S. W. 772, 24 Ky. L. Rep. 2200.

<sup>20</sup> *Hendrick v. Posey*, 104 Ky. 8, 45 S. W. 525, 46 S. W. 702, 20 Ky. L. Rep. 359.

<sup>1</sup> *Compton v. State*, 38 Ark. 601.

<sup>2</sup> *Marion County v. Rives*, 133 Ky. 477, 118 S. W. 309.

<sup>3</sup> *Randall v. Archer*, 5 Fla. 438;

*McDonald v. Napier*, 14 Ga. 89; *Atlantic Sav. Bank v. Hetterick*, 5 Thomp. & C. (N. Y.) 239; *Ford v. Gilbert*, 44 Ore. 259, 75 Pac. 138.

<sup>4</sup> *Dennis v. Kent Cir. Judge*, 42 Mich. 249, 3 N. W. 950.

<sup>5</sup> *Dennis v. Kent Cir. Judge*, 42 Mich. 249, 3 N. W. 950.

court does not authorize the imposition of a lien thereon in favor of the attorney, even though such payment resulted from his services.<sup>6</sup>

§ 624. **Fund in Equity.**—It is well settled that an attorney is entitled to compensation out of a fund which has been brought into a court of equity by his aid, and to which he looks for payment.<sup>7</sup> Strictly speaking, perhaps, the fund is not actually charged with a lien; indeed, it is rather in the nature of an equitable allowance; but it has the effect of a lien, and is frequently spoken of as such.<sup>8</sup> Thus, under a state law which gave an attorney a lien upon the cause of action of his client which attached "to the proceeds thereof in whosoever hands they may come," and which might be enforced by a suit in equity against the client or any party holding the proceeds, it was held that the attorneys for a stockholder in suits brought on behalf of all the stockholders against certain directors of a corporation, to compel them to account for and pay over to the corporation the amount of illegal dividends declared and paid by them from the capital, as a result of which the defendants paid over a large sum to the corporation, are entitled to a lien on the fund so created for their services.<sup>9</sup> In

<sup>6</sup> Appeal of Dubois, 38 Pa. St. 231, 80 Am. Dec. 478; *Thompson v. Boyle*, 85 Pa. St. 477; *Quakertown & E. R. Co. v. Guarantors' Liability Indemnity Co.*, 206 Pa. St. 350, 55 Atl. 1033; *Patrick v. Bingaman*, 2 Pa. Super. Ct. 113; *Seybert v. Salem Tp.*, 22 Pa. Super. Ct. 459. See also *Cain v. Hockensmith Wheel & Car Co.*, 157 Fed. 992.

<sup>7</sup> See *supra*, §§ 477-479.

<sup>8</sup> *United States*.—*Wolfe v. Lewis*, 19 How. 280, 15 U. S. (L. ed.) 643; *Central R. & Banking Co. v. Pettus*, 113 U. S. 116, 5 S. Ct. 387, 28 U. S. (L. ed.) 915; *Ex p. Plitt*, 2 Wall. Jr. (C. C.) 453, 19 Fed. Cas. No. 11,228; *Mahone v. Southern Tel. Co.*, 33 Fed. 702; *Adams v. Kehler Milling Co.*, 38 Fed. 281; *Blair v. Harrison*, 57 Fed.

257, 18 U. S. App. 27, 6 C. C. A. 326; *In re Baxter*, 154 Fed. 22, 83 C. C. A. 106.

*Alabama*.—*Strong v. Taylor*, 82 Ala. 213, 2 So. 760; *Higley v. White*, 102 Ala. 604, 15 So. 141; *Kelly v. Horsely*, 147 Ala. 508, 41 So. 902.

*Pennsylvania*.—*Spencer's Appeal*, 6 Sad. 488, 9 Atl. 523; *McKelvy's Appeal*, 108 Pa. St. 615; *Price's Appeal*, 116 Pa. St. 410, 9 Atl. 856; *Patrick v. Bingaman*, 2 Pa. Super. Ct. 113; *Seybert v. Salem Tp.*, 22 Pa. Super. Ct. 459.

*West Virginia*.—*Weigand v. Alliance Supply Co.*, 44 W. Va. 133, 28 S. E. 803.

<sup>9</sup> *Meighan v. American Grass Twine Co.*, 154 Fed. 346, 83 C. C. A. 124.

such cases the amount to which the attorney is entitled may be determined by the court itself, or through an auditor; the matter need not be referred to the jury.<sup>10</sup> But it is essential, in most cases at least, that the client should be entitled to participate in the fund.<sup>11</sup>

**§ 625. Attorney's Aid and Client's Participation Necessary.** — In order that an attorney may be entitled to a lien on funds, either in courts of law or equity, it is, as a general rule at least, essential that such funds were procured with the aid of the attorney's services.<sup>12</sup> An attorney's interest can be no greater than that of his client,<sup>13</sup> and he will not be entitled to a lien as against funds in the distribution of which his client did not participate,<sup>14</sup> or the procurement of which he resisted.<sup>15</sup>

**§ 626. Lien Follows Fund.** — As a general rule, an attorney's charging lien will follow the fund to which it has attached, and cling to any property into which it can be traced, at least until it reaches the hands of a *bona fide* purchaser.<sup>16</sup> Thus, where a plaintiff in foreclosure proceedings took land instead of money,

<sup>10</sup> McKelvy's Appeal, 108 Pa. St. 615.

<sup>11</sup> See *infra*, § 625.

<sup>12</sup> *Fulton v. Harrington*, 7 *Houst. (Del.)* 182, 30 *Atl.* 856; *Com. v. Mechanics' Mut. Fire Ins. Co.*, 122 *Mass.* 421; *Lindner v. Hine*, 84 *Mich.* 511, 48 *N. W.* 43; *Schmertz v. Hammond*, 51 *W. Va.* 408, 41 *S. E.* 184.

<sup>13</sup> *Baltimore & O. R. Co. v. Brown*, 79 *Md.* 442, 29 *Atl.* 524; *Moses v. Ocoee Bank*, 1 *Lea (Tenn.)* 398.

<sup>14</sup> *United States*.—*Gregory v. Pike*, 67 *Fed.* 837, 21 *U. S. App.* 658, 15 *C. C. A.* 33.

*Georgia*.—*Waters v. Greenway*, 17 *Ga.* 592; *Mitchell v. Atkins*, 71 *Ga.* 681.

*Kentucky*.—*Wathen v. Russell*, 47 *S. W.* 437, 20 *Ky. L. Rep.* 709.

*Michigan*.—*Canney v. Canney*, 131 *Mich.* 363, 91 *N. W.* 620, 9 *Detroit Leg. N.* 356.

*New York*.—*Matter of Brackett*, 114 *App. Div.* 257, 99 *N. Y. S.* 802, affirmed 189 *N. Y.* 502, 81 *N. E.* 1160; *Mooney v. Mooney*, 29 *Misc.* 707, 7 *N. Y. Ann. Cas.* 257, 62 *N. Y. S.* 769.

*Oregon*.—*Ford v. Gilbert*, 44 *Ore.* 259, 75 *Pac.* 138.

*West Virginia*.—*Schmertz v. Hammond*, 51 *W. Va.* 408, 41 *S. E.* 184.

<sup>15</sup> *Lehman v. Tallassee Mfg. Co.*, 64 *Ala.* 567; *Ball v. Vason*, 56 *Ga.* 264; *Thompson v. Thompson*, 65 *S. W.* 457, 23 *Ky. L. Rep.* 1535.

<sup>16</sup> *Noftzger v. Moffett*, 63 *Kan.* 354, 65 *Pac.* 670; *Conkling v. Austin*, 111 *Mo. App.* 292, 86 *S. W.* 911.

the attorney's lien attached to the land.<sup>17</sup> So, where an attorney was retained to collect certain demands out of which he was to be paid, and, pending suit, the client purchased land from the defendant for the amount of the claim, it was held that the attorney had an equitable lien on the land.<sup>18</sup> Nor can the lien be defeated by fraud or artifice in transactions of this kind.<sup>19</sup>

### *Real and Personal Property.*

§ 627. **Lien on Land in Absence of Statute.** — In the absence of statutory authority therefor, an attorney's charging lien does not attach to his client's land, even though it may have been the subject-matter of the litigation wherein the lien accrued,<sup>20</sup> excepting, possibly, under an express contract providing for such a lien.<sup>1</sup> It has been held, however, that an attorney's charging lien attached to a decree, for a certain sum, which charged a lien on land in default of payment within a certain time.<sup>2</sup> And it has also been held that the charging lien will be transferred to land taken by the client in satisfaction of a judgment,<sup>3</sup> or a claim for

<sup>17</sup> *Porter v. Hanson*, 36 Ark. 591.  
See also *Loofbourow v. Hicks*, 24 Utah 49, 66 Pac. 602, 55 L.R.A. 874.

<sup>18</sup> *Fitzgerald's Ex'r v. Irby*, 99 Va. 81, 37 S. E. 777, 3 Va. Sup. Ct. Rep. 1. See also *McIntosh v. Bach*, 110 Ky. 701, 62 S. W. 515.

<sup>19</sup> *Conkling v. Austin*, 111 Mo. App. 292, 86 S. W. 911.

<sup>20</sup> *Alabama*.—*Hinson v. Gamble*, 65 Ala. 605; *Lee v. Winston*, 68 Ala. 402; *McCullough v. Flournoy*, 69 Ala. 189; *McWilliams v. Jenkins*, 72 Ala. 480; *Higley v. White*, 102 Ala. 604, 15 So. 141; *Kelly v. Horsely*, 147 Ala. 508, 41 So. 902; *Carroll v. Draughon*, 154 Ala. 430, 45 So. 919.

*Illinois*.—*Humphrey v. Browning*, 16 Ill. 176, 95 Am. Dec. 416; *La Framboise v. Grow*, 56 Ill. 197; *Smith v. Young*, 62 Ill. 210.

*Iowa*.—*Keeln v. Keeln*, 115 Ia. 467, 88 N. W. 957.

*Kansas*.—*Holmes v. Waymire*, 73 Kan. 104, 9 Ann. Cas. 624, 84 Pac. 558.

*Louisiana*.—*Mechanics' & Traders' Ins. Co. v. Levi*, 40 La. Ann. 135, 3 So. 559.

*Mississippi*.—*Stewart v. Flowers*, 44 Miss. 513, 7 Am. Rep. 707; *Martin v. Harrington*, 57 Miss. 208.

*Vermont*.—*Smalley v. Clark*, 22 Vt. 598.

*West Virginia*.—*Fowler v. Lewis' Adm'r*, 36 W. Va. 112, 14 S. E. 447; *Hogg v. Dower*, 36 W. Va. 200, 14 S. E. 995; *McCoy v. McCoy*, 36 W. Va. 772, 15 S. E. 973.

<sup>1</sup> See the following section.

<sup>2</sup> *Higley v. White*, 102 Ala. 604, 15 So. 141.

<sup>3</sup> See *infra*, § 634.



money.<sup>4</sup> In this connection it will be recalled that an attorney's charging lien on a judgment recovered for his client has been recognized in some jurisdictions as a common-law right,<sup>5</sup> and it naturally follows that where such judgment is, under the local law, a lien on the adversary's land, the attorney's charging lien also becomes, though indirectly, a charge thereon.

**§ 628. Lien Created by Contract.** — In some jurisdictions a lien may be created by a contract, between the attorney and his client, whereby it is expressly agreed that the attorney is to have a lien upon land as security for the payment of his compensation,<sup>6</sup> or whereby the attorney is given an undivided interest in land to be recovered.<sup>7</sup> Thus, in Louisiana, it was held that, although a conveyance of land to an attorney for compensation for professional services was void, the attorney, nevertheless, was entitled to a privilege on the land for such sums as were expended by him for the client's benefit.<sup>8</sup> But a contract under which an attorney was to be compensated "out of the purchase money to be received from the sale of property," was held not to create a lien on the property.<sup>9</sup> So, where the owner of land, which had been condemned for public use, agreed to pay his attorney a share of the award which was "to be a lien on the property," it was held that such contract was not effective as against one who, pending the condemnation proceedings, had procured a decree against the landowner for the specific performance of a contract of sale for the land in question, "subject to the judgment of condemnation."<sup>10</sup>

**§ 629. Lien on Land by Virtue of Statute.** — The right of an attorney to a charging lien for his services as against land

<sup>4</sup> Porter v. Hanson, 36 Ark. 591. See also McIntosh v. Bach, 110 Ky. 701, 62 S. W. 515. And see *supra*, § 626.

<sup>5</sup> See *infra*, § 634.

<sup>6</sup> Mackall v. Willoughby, 167 U. S. 681, 17 S. Ct. 954, 42 U. S. (L. ed.) 323; Smith v. Young, 62 Ill. 210; Adams v. Schmitt, 68 N. J. Eq. 168, 60 Atl. 345. And see *supra*, § 583, Attys. at L. Vol. II.—65.

as to the creation of a lien by contract generally.

<sup>7</sup> Hoffman v. Vallejo, 45 Cal. 564.

<sup>8</sup> Hodges v. Ory, 48 La. Ann. 54, 18 So. 899.

<sup>9</sup> Weiss v. Gullett, 18 Colo. App. 122, 70 Pac. 442.

<sup>10</sup> Grigg v. McNulty, 5 Misc. 334, 25 N. Y. S. 504.

which is the subject-matter of litigation, in which he has been retained, is now recognized by legislation in many states;<sup>11</sup> and such lien will not be affected by the conveyance of the land pending suit.<sup>12</sup> In the event of such conveyance, it has been held that the attorney's lien should be satisfied out of property in the inverse order of alienation.<sup>13</sup> Of course, an attorney's lien cannot exist with respect to property to which his client has neither claim nor title.<sup>14</sup>

**§ 630. Necessity of Recovery.**—It has been held under statute prevailing in some jurisdictions that, in order to be entitled to a charging lien as against land, it is essential, not only that the land should be the subject-matter of the litigation, but, also, that it must have been "recovered" therein.<sup>15</sup> Where this rule obtains, a lien will not arise from the mere fact that the at-

<sup>11</sup> *Arkansas*.—Porter v. Hanson, 36 Ark. 591; Lane v. Hallum, 38 Ark. 385; McCain v. Portis, 42 Ark. 402; Hershy v. Duval, 47 Ark. 86, 14 S. W. 469; Greer v. Ferguson, 56 Ark. 324, 19 S. W. 966; Greenlee v. Rowland, 85 Ark. 101, 107 S. W. 193.

*Colorado*.—Fillmore v. Wells, 10 Colo. 228, 15 Pac. 343, 3 Am. St. Rep. 567.

*Georgia*.—Usry v. Usry, 64 Ga. 579; Fry v. Calder, 74 Ga. 7; Strohecker v. Irvine, 76 Ga. 639, 2 Am. St. Rep. 62; Wooten v. Denmark, 85 Ga. 578, 11 S. E. 861; Lovett v. Moore, 98 Ga. 158, 26 S. E. 498.

*Indiana*.—Wood v. Hughes, 138 Ind. 179, 37 N. E. 588.

*Kentucky*.—McIntosh v. Bach, 110 Ky. 701, 62 S. W. 515. See also Reid v. Punch, 2 Ky. L. Rep. 62.

*New York*.—N. Y. Judiciary Law, § 475; Grigg v. McNulty, 5 Misc. 334, 25 N. Y. S. 504; Skinner v. Busse, 38 Misc. 265, 11 N. Y. Ann. Cas. 156, 77 N. Y. S. 560.

*Tennessee*.—Hunt v. McClanahan, 1

Heisk. 503; Perkins v. Perkins, 9 Heisk. 95; Sharp v. Fields, 5 Lea 326; Hill v. Hill, 62 S. W. 209. It is not clear whether, in this state, the lien exists on land by virtue of statutory authority or not.

*Texas*.—Chapman v. Sneed, 17 Tex. 428; Wade v. Flanary, 108 S. W. 506, reversed as to other points, 102 Tex. 63, 113 S. W. 8.

*Utah*.—Comp. Laws of Utah, § 135.

<sup>12</sup> McCain v. Portis, 42 Ark. 402; Lovett v. Moore, 98 Ga. 158, 26 S. E. 498; Hunt v. McClanahan, 1 Heisk. (Tenn.) 503; Sharp v. Fields, 5 Lea (Tenn.) 326.

<sup>13</sup> Butts v. Carey, 143 App. Div. 356, 128 N. Y. S. 533. See also Morrison v. Ponder, 45 Ga. 167.

<sup>14</sup> Joseph's Adm'r v. Lapp's Adm'r, 78 S. W. 1119, 25 Ky. L. Rep. 1875; In re Brackett, 114 App. Div. 257, 99 N. Y. S. 802, affirmed 189 N. Y. 502, 81 N. E. 1160. See also La Framboise v. Grow, 56 Ill. 197.

<sup>15</sup> Eginton v. Rusk, 3 Ky. L. Rep. 689.

torney successfully defended his client's title,<sup>16</sup> or aided in the removing of a cloud therefrom,<sup>17</sup> or prevented the establishment of a resulting trust thereon.<sup>18</sup> Nor will a charging lien accrue for services rendered to a grantee in a suit brought by his grantor to rescind the sale.<sup>19</sup> So, it has been held that an attorney is not entitled to a charging lien against land by merely averting a forced sale thereof.<sup>20</sup> And where the client's right to land has been established on condition that he pay the defendant a certain sum, it seems that such payment will be a condition precedent to the right of the attorney to have a lien charged on the land.<sup>1</sup> But land purchased by a mortgagor in foreclosure proceedings has been said to be "recovered."<sup>2</sup> And where an attorney, at the instance of minority stockholders, restored property to the corporation which had been fraudulently disposed of by its officers, it was held that the attorney "recovered" the property, and was entitled to a lien thereon.<sup>3</sup> So, where a client's land was taken possession of by his adversary, under a decision of the trial court, and such decision was reversed on appeal, whereupon the possession was surrendered to the client, it was held that the client "recovered" the land.<sup>4</sup> And where an attorney's compensation, under a contract with his client, was dependent on the recovery of certain land, it was held that the agreement should be liberally construed, and that land which, in consequence of the attorney's services, came into the client's possession, and was held by him without interruption, was, in fact, "recovered."<sup>5</sup>

<sup>16</sup> *Greer v. Ferguson*, 56 Ark. 324, 19 S. W. 966; *Greenhill v. Bowling's Adm'r.*, 13 Ky. L. Rep. 495; *Lytle v. Bach*, 93 S. W. 608, 29 Ky. L. Rep. 424.

<sup>17</sup> *Hershy v. Du Val*, 47 Ark. 86, 14 S. W. 469.

<sup>18</sup> *Garner v. Garner*, 1 Lea (Tenn.) 29.

<sup>19</sup> *Eginton v. Rusk*, 3 Ky. L. Rep. 689. See also *Landreth v. Powell*, 122 Tenn. 195, 121 S. W. 500.

<sup>20</sup> *Hodnett v. Bonner*, 107 Ga. 452, 33 S. E. 416.

<sup>1</sup> *Usry v. Usry*, 64 Ga. 579.

<sup>2</sup> *Wooten v. Denmark*, 85 Ga. 578, 11 S. E. 861.

<sup>3</sup> *Grant v. Lookout Mountain Co.*, 93 Tenn. 691, 28 S. W. 90, 27 L.R.A. 98.

<sup>4</sup> *Greenlee v. Rowland*, 85 Ark. 101, 107 S. W. 193.

<sup>5</sup> *Mackall v. Willoughby*, 167 U. S. 681, 17 S. Ct. 954, 42 U. S. (L. ed.) 323.

§ 631. **Partition Proceedings.** — In most jurisdictions provision is made by statute for the payment of counsel fees in partition proceedings, especially where they are *ex parte*. The compensation so provided for is usually taxed as part of the costs,<sup>6</sup> or charged as a lien upon the land.<sup>7</sup> But in some states an attorney is not entitled to a lien for services rendered by him in partition proceedings,<sup>8</sup> nor can the allotment of land in such a proceeding be said to be a recovery thereof.<sup>9</sup> Nor is the attorney of a defendant entitled to a lien in case of settlement.<sup>10</sup> Of course, it is possible that partition proceedings may be included in those statutes, prevailing in some jurisdictions, which provide for a lien upon the client's cause of action or judgment.<sup>11</sup>

§ 632. **Homesteads.** — That the property, in connection with which professional services have been rendered, is a homestead, does not make it any the less subject to an attorney's charging lien.<sup>12</sup> And where an attorney prevented the sale of a homestead under an attachment, and procured the rescission of a fraudulent conveyance thereof, it was held that he was entitled to a lien on the theory that he had "recovered" the property.<sup>13</sup> But an appli-

<sup>6</sup> See *supra*, § 479. See also *Habberston v. Habberston*, 156 Ill. 444, 41 N. E. 222; *Potts v. Gray*, 60 Miss. 57; *Hoffman v. Smith*, 61 Miss. 544; *Neblett v. Neblett*, 70 Miss. 572, 12 So. 598.

<sup>7</sup> *Creighton v. Ingersoll*, 20 Barb. (N. Y.) 541; *Cohn v. Polstein*, 41 Misc. 431, 84 N. Y. S. 1072; *Vaughn v. Vaughn*, 12 Heisk. (Tenn.) 472; *Keith v. Fitzhugh*, 15 Lea (Tenn.) 50. See also *Martin v. Kennedy*, 83 Ky. 335, 344.

<sup>8</sup> *Boyle v. Boyle*, 116 Fed. 764 (cited under the laws of Pennsylvania); *Gibson v. Buckner*, 65 Ark. 84, 44 S. W. 1034; *Gladney v. Rush*, 68 Ark. 80, 56 S. W. 448; *Newbaker v. Mricks*, 5 Watts (Pa.) 183; *Brown's Estate*, 131 Pa. St. 352, 18 Atl.

901; *Cozzens v. Whitney*, 3 R. I. 79.

<sup>9</sup> *Gibson v. Buckner*, 65 Ark. 84, 44 S. W. 1034. And see *supra*, § 630. See also *Horn v. Horn*, 115 App. Div. 292, 100 N. Y. S. 790.

<sup>10</sup> *Horn v. Horn*, 115 App. Div. 292, 100 N. Y. S. 790.

<sup>11</sup> As to the right to a lien on a cause of action generally, see *supra*, §§ 613-617. And as to liens on judgments generally, see *infra*, §§ 634-637.

<sup>12</sup> *Patrick v. Morrow*, 33 Colo. 509, 81 Pac. 242, 108 Am. St. Rep. 107; *Stroecker v. Irvine*, 76 Ga. 639, 2 Am. St. Rep. 62; *McLean v. Lerch*, 105 Tenn. 693, 58 S. W. 640.

<sup>13</sup> *McLean v. Lerch*, 105 Tenn. 693, 58 S. W. 640.

cation for the setting apart and valuation of a homestead is not a suit for money, nor the recovery of real or personal property.<sup>14</sup>

**§ 633. Personal Property.** — So, also, an attorney's lien attaches to personal property in some jurisdictions. In some statutes the word "property" is used generally, and in others it is specified that the lien of an attorney may attach to either real or personal property,<sup>15</sup> to the extent of the client's interest therein.<sup>16</sup> Thus, an attorney's lien will attach to the bonds of a railway company where he has been employed to protect his client's interest therein in foreclosure proceedings.<sup>17</sup> The lien so acquired follows the property, and will attach to money into which the property has been converted.<sup>18</sup> In the absence of statute, however, an attorney's lien does not attach to personal property; and whether such property is made subject to the lien by statute must be determined from an examination of the local law.<sup>19</sup>

#### *Judgments, Decrees, and Awards.*

**§ 634. Judgments and Decrees Generally.** — The right of an attorney to a charging lien on a judgment recovered by him for his client, as security for his compensation, is now recognized in nearly every jurisdiction,<sup>20</sup> and will be protected in courts of law

<sup>14</sup> Haygood v. Dannenberg, 102 Ga. 24, 29 S. E. 293.

<sup>15</sup> Lane v. Hallum, 38 Ark. 385; Wooten v. Denmark, 85 Ga. 578, 11 S. E. 861; Lovett v. Moore, 98 Ga. 158, 26 S. E. 498; Meyers v. Bloon, 20 Tex. Civ. App. 554, 50 S. W. 217.

<sup>16</sup> Garr v. Breeze, 10 Ky. L. Rep. 77 (abstract).

<sup>17</sup> Coe v. East & West R. Co. of Alabama, 65 Fed. 16.

<sup>18</sup> Noftzger v. Moffett, 63 Kan. 354, 65 Pac. 670. See *supra*, § 626.

<sup>19</sup> Goslin v. Campbell, 7 Ohio Dec. (Reprint) 456, 3 Cine. L. Bul. 369.

<sup>20</sup> *England*.—Sullivan v. Pearson, L. R. 4 Q. B. 153, 38 L. J. Q. B. 65; Barker v. St. Quintin, 12 M. & W.

441, 1 Dowl. & L. 542; Griffin v. Eyles, 1 H. Bl. 122; Cox v. Prichard, 20 L. J. Q. B. 353; Slater v. Sutherland, 33 L. J. Q. B. 37.

*United States*.—Central R. & B. Co. v. Pettus, 113 U. S. 116, 5 S. Ct. 387, 28 U. S. (L. ed.) 915; Tuttle v. Clafflin, 86 Fed. 964.

*Alabama*.—Warfield v. Campbell, 38 Ala. 527, 82 Am. Dec. 724; Ex p. Lehman Durr & Co., 59 Ala. 631; McWilliams v. Jenkins, 72 Ala. 480; Higley v. White, 102 Ala. 604, 15 So. 141; Kelly v. Horsely, 147 Ala. 508, 41 So. 902; Carroll v. Draughton, 154 Ala. 430, 45 So. 919; Fuller v. Clemmons, 158 Ala. 340, 48 So. 101.

*Arkansas*.—*Sexton v. Pike*, 13 Ark. 193.

*Colorado*.—*Fillmore v. Wells*, 10 Colo. 228, 15 Pac. 343, 3 Am. St. Rep. 567; *Johnson v. McMillan*, 13 Colo. 423, 22 Pac. 769.

*Connecticut*.—*Andrews v. Morse*, 12 Conn. 444, 31 Am. Dec. 752; *Cooke v. Thresher*, 51 Conn. 105; *De Wanda-laer v. Sawdey*, 78 Conn. 654, 63 Atl. 446.

*Florida*.—*Carter v. Davis*, 8 Fla. 183.

*Indiana*.—*Blair v. Lanning*, 61 Ind. 499; *Hanna v. Island Coal Co.*, 5 Ind. App. 163, 31 N. E. 846, 51 Am. St. Rep. 246; *Miedreich v. Rank*, 40 Ind. App. 393, 82 N. E. 117.

*Iowa*.—*Hubbard v. Ellithorpe*, 135 Ia. 259, 112 N. W. 796, 124 Am. St. Rep. 271.

*Kentucky*.—*Harlan v. Bennett*, 127 Ky. 572, 106 S. W. 287, 128 Am. St. Rep. 360, 32 Ky. L. Rep. 493.

*Maine*.—*Potter v. Mayo*, 3 Greenl. 34, 14 Am. Dec. 211; *Gammon v. Chandler*, 30 Me. 152; *Hobson v. Watson*, 34 Me. 20, 56 Am. Dec. 632; *Bickford v. Ellis*, 50 Me. 121.

*Massachusetts*.—*Woods v. Verry*, 4 Gray 357; *Baker v. Cook*, 11 Mass. 236; *Bruce v. Anderson*, 176 Mass. 161, 57 N. E. 354.

*Minnesota*.—*Northrup v. Hayward*, 102 Minn. 307, 12 Ann. Cas. 341, 113 N. W. 701.

*Mississippi*.—*Stewart v. Flowers*, 44 Miss. 513, 7 Am. Rep. 707.

*Missouri*.—*Taylor v. St. Louis Transit Co.*, 198 Mo. 715, 97 S. W. 155.

*Nebraska*.—*Griggs v. White*, 5 Neb. 467; *Taylor v. Stull*, 79 Neb. 295, 112 N. W. 577.

*New Hampshire*.—*Young v. Dearborn*, 27 N. H. 324; *Currier v. Boston*

& M. R. R., 37 N. H. 223; *Christie v. Sawyer*, 44 N. H. 298.

*New York*.—N. Y. Judiciary Law, § 475; *Williams v. Ingersoll*, 23 Hun 284; *Pulver v. Harris*, 52 N. Y. 73; *Goodrich v. McDonald*, 112 N. Y. 157, 19 N. E. 649; *Matter of Regan*, 167 N. Y. 343, 60 N. E. 656; *Fischer-Hansen v. Brooklyn Heights R. Co.*, 173 N. Y. 492, 66 N. E. 395; *Serwer v. Serwer*, 91 App. Div. 538, 86 N. Y. S. 838; *Agricultural Ins. Co. v. Smith*, 112 App. Div. 840, 35 Civ. Proc. 338, 98 N. Y. S. 347; *Dimick v. Cooley*, 3 Civ. Proc. 141; *Kipp v. Rapp*, 7 Civ. Proc. 316; *Keenan v. Durlinger*, 12 Abb. Pr. 327 note; *Ackerman v. Ackerman*, 14 Abb. Pr. 229; *Cragin v. Travis*, 1 How. Pr. 157; *Ward v. Syme*, 9 How. Pr. 16; *Sherwood v. Buffalo & N. Y. C. R. Co.*, 12 How. Pr. 136; *Haight v. Holcomb*, 16 How. Pr. 160, 7 Abb. Pr. 210; *Owen v. Mason*, 18 How. Pr. 156; *Adams v. Fox*, 27 How. Pr. 409; *Crotty v. MacKenzie*, 52 How. Pr. 54; *Albert Palmer Co. v. Van Orden*, 64 How. Pr. 79; *Turno v. Parke*, 2 How. Pr. N. S. 35; *Adsit v. Hall*, 3 How. Pr. N. S. 373.

*North Dakota*.—*Clark v. Sullivan*, 3 N. D. 280, 55 N. W. 733; *Lown v. Casselman*, 141 N. W. 73.

*South Dakota*.—*Leighton v. Servenson*, 8 S. D. 350, 66 N. W. 938.

*Tennessee*.—Ex p. *Smithson*, 108 Tenn. 412, 67 S. W. 864.

*Texas*.—*Chapman v. Sneed*, 17 Tex. 428; *Mays v. Sanders*, 90 Tex. 132, 37 S. W. 595; *Dutton v. Mason*, 21 Tex. Civ. App. 389, 52 S. W. 651.

*Utah*.—Comp. Laws of Utah, § 135. See also *Gray v. Denhalter*, 17 Utah 312, 53 Pac. 976.

*West Virginia*.—*Renick v. Lindington*, 16 W. Va. 378; *Fowler v. Lewis*,

and equity.<sup>1</sup> As a general rule, liens of this character also cover costs and disbursements.<sup>2</sup> In most instances the right to a lien upon a judgment is now provided for and regulated by statute. These statutes are not retroactive.<sup>3</sup> It has been held, however, that the statutory lien is merely declaratory of the common law.<sup>4</sup> But in some jurisdictions an attorney is not entitled to a charging lien on judgments recovered by him,<sup>5</sup> excepting, possibly, where there is an agreement providing for such a lien;<sup>6</sup> and in others it has been held that, in order to be entitled to a lien, the amount of the attorney's compensation must be fixed by a special contract or professional usage.<sup>7</sup> So, it has been held that a statute

36 W. Va. 112, 14 S. E. 447; *Bent v. Lipscomb*, 45 W. Va. 183, 31 S. E. 907, 72 Am. St. Rep. 815; *Hazeltine v. Keenan*, 54 W. Va. 600, 46 S. E. 609, 102 Am. St. Rep. 953; *Fisher v. Mylius*, 62 W. Va. 19, 57 S. E. 276.

*Wisconsin*.—*Howard v. Osceola*, 22 Wis. 453; *Courtney v. McGavock*, 23 Wis. 619; *Rice v. Garnhart*, 35 Wis. 282.

<sup>1</sup> *Andrews v. Morse*, 12 Conn. 444, 31 Am. Dec. 752. As to the effect of settlement without the attorney's consent, see *infra*, §§ 640-645.

<sup>2</sup> *Thayer v. Daniels*, 113 Mass. 129; *Kinney v. Tabor*, 62 Mich. 517, 29 N. W. 86, 512; *Barry v. Third Ave. R. Co.*, 87 App. Div. 543, 84 N. Y. S. 830; *Peetsch v. Quinn*, 6 Misc. 52, 26 N. Y. S. 729; *In re Lazelle*, 16 Misc. 515, 40 N. Y. S. 343.

But see *Robinson v. Hays*, 186 Fed. 295, 108 C. C. A. 373, wherein it was held that an attorney, who advanced money to his client to be used in payment of costs and expenses in litigation involving an estate, under an agreement that he was to be repaid from the estate if recovered, has no lien upon a judgment for costs recovered for such advances.

<sup>3</sup> *Young v. Renshaw*, 102 Mo. App. 173, 76 S. W. 701.

<sup>4</sup> *Brown v. Morgan*, 163 Fed. 395. See also *Martin v. Hawks*, 15 Johns. (N. Y.) 405; *Pulver v. Harris*, 52 N. Y. 73; *Randall v. Van Wagenen*, 115 N. Y. 527, 22 N. E. 361, 12 Am. St. Rep. 828. And see *supra*, § 579.

<sup>5</sup> *California*.—*Ex p. Kyle*, 1 Cal. 331; *Mansfield v. Dorland*, 2 Cal. 507.

*Illinois*.—*Humphrey v. Browning*, 46 Ill. 476, 95 Am. Dec. 446; *Forsythe v. Beveridge*, 52 Ill. 268, 4 Am. Rep. 612; *La Framboise v. Grow*, 56 Ill. 197; *Nichols v. Pool*, 89 Ill. 491; *Wyman v. Snyder*, 112 Ill. 99, 1 N. E. 469; *Story v. Hull*, 143 Ill. 506, 32 N. E. 265; *North Chicago St. R. Co. v. Ackley*, 171 Ill. 100, 49 N. E. 222, 44 L.R.A. 177; *Bromwell v. Turner*, 37 Ill. App. 561.

*Maryland*.—*Levy v. Steinbach*, 43 Md. 212.

*South Carolina*.—*Scharlock v. Ol- and*, 1 Rich. L. 207.

<sup>6</sup> *Barbee v. Aultman, Miller & Co.*, 102 Ia. 278, 71 N. W. 235. And see *supra*, § 583, as to liens created by contract generally.

<sup>7</sup> *Pugh v. Boyd*, 38 Miss. 326.

providing for a lien on money due the client in the hands of an adverse party, does not entitle the attorney to a lien on the judgment.<sup>8</sup>

§ 635. **As Affected by Nature of Judgment.** — Under the New York statute an attorney's lien attaches to any verdict, report, decision, or judgment in his client's favor.<sup>9</sup> A similar statute prevails in Missouri,<sup>10</sup> and in Utah.<sup>11</sup> So, in these and some other jurisdictions, a lien will accrue in favor of a defendant's attorney who recovers on a counterclaim.<sup>12</sup> An attorney's charging lien has been sustained on judgments for tort,<sup>13</sup> and in proceedings for foreclosure,<sup>14</sup> condemnation,<sup>15</sup> and the enforcement of liens.<sup>16</sup> So, a lien may accrue in proceedings in connection with the probate of a will,<sup>17</sup> or the recovery of a fine,<sup>18</sup> or in bastardy proceedings.<sup>19</sup> It has also been held that an attorney is entitled to a lien upon a restraining order, notwithstanding the difficulty he might encounter in attempting its enforcement.<sup>20</sup> So, a lien will accrue in special proceedings,<sup>1</sup> and on an award of arbitrators.<sup>2</sup> There must, however, be a recovery;<sup>3</sup> thus, it has been held that where

<sup>8</sup> *Patrick v. Leach*, 12 Fed. 661 (decided under a Nebraska statute); *Gibson v. Chicago, M. & St. P. R. Co.*, 122 Ia. 565, 98 N. W. 474. Compare the cases cited from those jurisdictions under the first note in this section.

<sup>9</sup> N. Y. Judiciary Law, § 475.

<sup>10</sup> *Taylor v. St. Louis Transit Co.*, 198 Mo. 715, 97 S. W. 155.

<sup>11</sup> Comp. Laws of Utah, § 135.

<sup>12</sup> See the statutes cited in the preceding note; and see also *supra*, § 598.

<sup>13</sup> *Bell v. Wood*, 7 Ky. L. Rep. 516; *Lee v. Van Voorhis*, 78 Ill. 575, 29 N. Y. S. 571, *affirmed* 145 N. Y. 603, 40 N. E. 164. And see *supra*, § 616.

<sup>14</sup> *Griggs v. White*, 5 Neb. 467.

<sup>15</sup> *Wendell v. Binninger*, 132 App. Div. 785, 117 N. Y. S. 616; *Ferris v. Lawrence*, 138 App. Div. 541, 123 N. Y. S. 269.

<sup>16</sup> *Harlan v. Bennett*, 106 S. W. 287, 32 Ky. L. Rep. 473.

<sup>17</sup> *Johnson v. Breckenridge*, 4 Ky. L. Rep. 994.

<sup>18</sup> *Woolf v. Jacobs*, 45 Super Ct. (N. Y.) 583.

<sup>19</sup> *Bickford v. Ellis*, 50 Me. 121; *Taylor v. Stull*, 79 Neb. 295, 112 N. W. 577.

<sup>20</sup> *Mt. Sterling Coal Road Co. v. Cox*, 2 Ky. L. Rep. 60.

<sup>1</sup> *Webb v. Parker*, 130 App. Div. 92, 114 N. Y. S. 489.

<sup>2</sup> *Webb v. Parker*, 130 App. Div. 92, 114 N. Y. S. 489; *Hutchinson v. Howard*, 15 Vt. 544.

<sup>3</sup> *Wilson v. House*, 10 Bush (Ky.) 406.

An attorney who does not recover the judgment can claim no lien thereon because of the fact that he subsequently represents the judgment



the judgment debt was paid out to intervening creditors,<sup>4</sup> or where there was a compromise before judgment, the statute giving a lien on a judgment had no application.<sup>5</sup> So, where a judgment has been reversed on appeal, the attorney's lien falls with it.<sup>6</sup> It has also been held that a proceeding whereby a fund is removed from one state to another, is not such a recovery as will justify the declaration of a lien in favor of the attorney for the moving party.<sup>7</sup>

**§ 636. Extent of Lien.** — An attorney's charging lien on a judgment extends to all incidents thereof,<sup>8</sup> and will attach, indirectly, to those things on which the judgment itself is a lien.<sup>9</sup> Thus, it will attach to securities which have been given for the payment of the judgment,<sup>10</sup> and to the proceeds of the judgment,<sup>11</sup> and to land which is taken in satisfaction thereof.<sup>12</sup> In some states it is held that, although the attorney's charging lien attaches to

creditor, or his assignee. *Alden v. White*, 32 Ind. App. 393, 68 N. E. 913; *Rook v. Dickinson*, 38 Misc. 690, 11 N. Y. Ann. Cas. 454, 78 N. Y. S. 287.

<sup>4</sup> *Ward v. Sherbondy*, 96 Ia. 477, 65 N. W. 413.

<sup>5</sup> *Koons v. Beach*, 147 Ind. 137, 45 N. E. 601, 46 N. E. 587.

<sup>6</sup> *Skaggs v. Hines*, 5 Ky. L. Rep. 106; *Dunlap v. Burnham*, 38 Me. 112.

But see *McDonald v. Napier*, 14 Ga. 89, wherein it appears that an attorney applied money, received by him from the defendant, in satisfaction of his fees, under an understanding with the defendant; and it was held that such application of the money was equivalent to a payment over to his client, and would protect the attorney from a suit by the defendant to recover the money back, on the reversal of the judgment.

<sup>7</sup> *Manson v. Stacker*, (Tenn.) 36 S. W. 188.

<sup>8</sup> *Kipp v. Rapp*, 7 Civ. Proc. (N. Y.) 316.

<sup>9</sup> *Atlantic Sav. Bank v. Hiler*, 3 Hun (N. Y.) 209.

See *supra*, §§ 618-626, as to whether the lien attaches to money, and other property.

<sup>10</sup> *Hobson v. Watson*, 34 Me. 20, 56 Am. Dec. 632; *Bickford v. Ellis*, 50 Me. 121; *Kipp v. Rapp*, 7 Civ. Proc. (N. Y.) 316; *Shackleton v. Hart*, 20 How. Pr. (N. Y.) 39, 12 Abb. Pr. 325 note; *Clark v. Sullivan*, 3 N. D. 280, 55 N. W. 733.

<sup>11</sup> *Higley v. White*, 102 Ala. 604, 15 So. 141; *Fuller v. Clemmons*, 158 Ala. 340, 48 So. 101; *Smith v. Goode*, 29 Ga. 185; *In re Bailey*, 31 Hun (N. Y.) 608; *In re Gates*, 51 App. Div. 350, 31 Civ. Proc. 88, 64 N. Y. S. 1050; *Shannessy v. Traphagen*, 13 N. Y. St. Rep. 754.

<sup>12</sup> *Isom v. Bell*, 7 Ky. L. Rep. 589; *Gray v. Denhalter*, 17 Utah 312, 53 Pac. 976; *Loofbourow v. Hicks*, 24 Utah 49, 66 Pac. 602, 55 L.R.A. 874.

the judgment, it does not become effective until the money has been collected thereon.<sup>13</sup>

**§ 637. Judgments and Decrees for Alimony.** — Alimony is intended for the support of the party to whom it has been awarded, and the court will not countenance its appropriation to any other purpose; therefore, an attorney can have no lien as against a judgment or decree for alimony, or as against a fund deposited to secure the payment thereof.<sup>14</sup> Nor is it material, in such case, that the parties become reconciled for the purpose of depriving the attorney of his compensation.<sup>15</sup> Indeed, an agreement by a wife to compensate her attorney for services in prosecuting an action for separation, by giving him a percentage of the alimony recovered, is void as against public policy.<sup>16</sup> But where property rights are adjudicated in a divorce proceeding, and a decree is entered making a final division thereof, and awarding to the party

<sup>13</sup> *Fisher v. Mylius*, 62 W. Va. 19, 57 S. E. 276. See also *Braden v. Ward*, 42 N. J. L. 518; *Casey v. March*, 30 Tex. 180.

<sup>14</sup> *Michigan*.—*Canney v. Canney*, 131 Mich. 363, 91 N. W. 620, 9 Detroit Leg. N. 356.

*New Jersey*.—*Gregory v. Gregory*, 32 N. J. Eq. 424.

*New York*.—*In re Brackett*, 114 App. Div. 257, 99 N. Y. S. 802, *affirmed* 189 N. Y. 502, 81 N. E. 1160; *Mooney v. Mooney*, 29 Misc. 707, 7 N. Y. Ann. Cas. 257, 62 N. Y. S. 769; *Weill v. Weill*, 18 Civ. Proc. 241, 10 N. Y. S. 627; *Branth v. Branth*, 19 Civ. Proc. 28, 10 N. Y. S. 638; *Keane v. Keane*, 86 Hun 159, 33 N. Y. S. 250.

*Tennessee*.—*Carden v. Carden*, 37 S. W. 1022. And see *Payne v. Payne*, 106 Tenn. 467, 61 S. W. 767.

*Washington*.—*Hillman v. Hillman*, 12 Wash. 595, 85 Pac. 61, 111 Am. St. Rep. 135.

Where a wife has compromised a suit against her husband for a di-

vorice, her solicitor cannot afterwards prosecute the suit in order to obtain his costs. *Chastain v. Lumpkin*, 134 Ga. 219, 67 S. E. 818; *Kirby v. Kirby*, 1 Paige (N. Y.) 565.

Neither can he revive for his own benefit a pending petition for alimony which fell with the dismissal of the case on reconciliation of the parties. *Petersen v. Petersen*, 76 Neb. 282, 107 N. W. 391, 124 Am. St. Rep. 812.

*Compare Putnam v. Tennyson*, 50 Ind. 456, wherein a lien as against alimony was upheld, and *Hubbard v. Ellithorpe*, 135 Ia. 259, 112 N. W. 796, 124 Am. St. Rep. 271, where the rule stated in the text was said to be applicable to temporary alimony only.

<sup>15</sup> *In re Brackett*, 114 App. Div. 257, 99 N. Y. S. 802, *affirmed* 189 N. Y. 502, 81 N. E. 1160.

<sup>16</sup> *In re Brackett*, 114 App. Div. 257, 99 N. Y. S. 802, *affirmed* 189 N. Y. 502, 81 N. E. 1160. And see also *supra*, § 437.

obtaining the divorce specific property, or a money judgment representing such party's interest, in lieu thereof, it has been held that the attorney is entitled to a lien thereon for his services.<sup>17</sup>

*To What Retaining Lien Attaches.*

§ 638. Property in Possession. — An attorney's retaining lien, which has been considered generally heretofore,<sup>18</sup> extends to all books, papers, and property which come into the attorney's possession,<sup>19</sup> in the course of his professional employment,<sup>20</sup> and irrespective of the purpose for which they were placed in his

<sup>17</sup> *Hubbard v. Ellithorpe*, 135 Ia. 259, 112 N. W. 796, 124 Am. St. Rep. 271.

<sup>18</sup> See *supra*, §§ 573-577.

<sup>19</sup> *United States*.—*Leszynsky v. Merritt*, 9 Fed. 688; *Finance Co. of Pennsylvania v. Charleston, C. & C. R. Co.*, 46 Fed. 426; *In re Baxter*, 154 Fed. 22, 83 C. C. A. 106; *In re Brown*, 1 N. Y. Leg. Obs. 69, 4 Fed. Cas. No. 1,984.

*Arkansas*.—*Gist v. Hanly*, 33 Ark. 233.

*Illinois*.—*Sanders v. Seelye*, 128 Ill. 631, 21 N. E. 601.

*Louisiana*.—*Butchers' Union Slaughter-House & Live-Stock Landing Co. v. Crescent City Live-Stock Landing & Slaughter-House Co.*, 41 La. Ann. 355, 6 So. 508.

*Michigan*.—*Robinson v. Hawes*, 56 Mich. 135, 22 N. W. 222.

*Minnesota*.—*First State Bank v. Sibley County Bank*, 96 Minn. 456, 105 N. W. 485, 489.

*Mississippi*.—*Stewart v. Flowers*, 44 Miss. 513, 7 Am. Rep. 707.

*Nebraska*.—*Cones v. Brooks*, 60 Neb. 698, 84 N. W. 85; *Phillips v. Hogue*, 63 Neb. 192, 88 N. W. 180.

*New Hampshire*.—*Dennett v. Cutts*, 11 N. H. 163.

*New York*.—*In re Russell*, 1 How. Pr. 149; *St. John v. Diefendorf*, 12 Wend. 261; *In re McGuire*, 106 App. Div. 131, 94 N. Y. S. 97; *In re Edward Ney Co.*, 114 App. Div. 467, 99 N. Y. S. 982.

*Pennsylvania*.—*Aycinena v. Peries*, 6 Watts & S. 243; *Balsbaugh v. Frazer*, 19 Pa. St. 95; *Dubois's Appeal*, 38 Pa. St. 231, 80 Am. Dec. 478; *McKelvy's Appeal*, 108 Pa. St. 615; *Quakertown & E. R. Co. v. Guarantors' Liability Indemnity Co.*, 206 Pa. St. 350, 55 Atl. 1033.

*South Dakota*.—*Winans v. Grable*, 18 S. D. 182, 99 N. W. 1110.

*Tennessee*.—*McDonald v. Charleston, C. & C. R. Co.*, 93 Tenn. 281, 24 S. W. 252.

*Texas*.—*Casey v. March*, 30 Tex. 185; *Thomson v. Findlater Hardware Co.*, 156 S. W. 301.

*Vermont*.—*Hutchinson v. Howard*, 15 Vt. 544; *Davis v. Farwell*, 80 Vt. 166, 67 Atl. 129.

<sup>20</sup> *De Lamater v. McCaskie*, 4 Dem. (N. Y.) 549; *Lawrence v. Townsend*, 88 N. Y. 24; *Winans v. Grable*, 18 S. D. 182, 99 N. W. 1110.

hands;<sup>1</sup> providing, of course, that such purpose is consistent with the right to charge a lien thereon.<sup>2</sup> So, where several attorneys are engaged in conducting litigation for a client, property coming into the possession of any one of them, for the purposes of such litigation, inures to the benefit of all.<sup>3</sup> Thus a retaining lien will attach to bonds,<sup>4</sup> notes,<sup>5</sup> and other securities.<sup>6</sup> So, the lien will attach to a town order,<sup>7</sup> municipal warrant,<sup>8</sup> check,<sup>9</sup> bank-book,<sup>10</sup> and accounts.<sup>11</sup> The lien will also attach as to deeds,<sup>12</sup> leases,<sup>13</sup> insurance policies,<sup>14</sup> and shares of stock.<sup>15</sup> So, it has

<sup>1</sup> *Sanders v. Seelye*, 128 Ill. 631, 21 N. E. 601; *Scott v. Morris*, 131 Ill. App. 605.

<sup>2</sup> See the following section.

<sup>3</sup> *Sanders v. Seelye*, 128 Ill. 631, 21 N. E. 601, *affirming* 27 Ill. App. 288.

<sup>4</sup> *United States*.—*McPherson v. Cox*, 96 U. S. 404, 24 U. S. (L. ed.) 746; *Coe v. East & West R. Co. of Alabama*, 65 Fed. 16.

*Illinois*.—*Sanders v. Seelye*, 128 Ill. 631, 21 N. E. 601, *affirming* 27 Ill. App. 288.

*Kentucky*.—*McIntosh v. Bach*, 110 Ky. 701, 62 S. W. 515, 23 Ky. L. Rep. 74.

*Maine*.—*Hobson v. Watson*, 34 Me. 20, 56 Am. Dec. 632; *Bickford v. Ellis*, 50 Me. 121.

*New York*.—*Fairbanks v. Sargent*, 39 Hun 588, *affirmed* 104 N. Y. 108, 9 N. E. 870, 58 Am. Rep. 490; *Arkenburgh v. Arkenburgh*, 27 Misc. 760, 59 N. Y. S. 612, *affirmed* 49 App. Div. 636, 64 N. Y. S. 742, 176 N. Y. 551, 68 N. E. 1114; *Shackleton v. Hart*, 20 How. Pr. 39, 12 Abb. Pr. 325 note.

<sup>5</sup> *United States*.—*In re Brown*, 1 N. Y. Leg. Obs. 69, 4 Fed. Cas. No. 1,984.

*Alabama*.—*Tillman v. Reynolds*, 48 Ala. 365.

*Mississippi*.—*Stewart v. Flowers*, 44 Miss. 513, 7 Am. Rep. 707.

*New Hampshire*.—*Dennett v. Cutts*, 11 N. H. 163.

*New York*.—*Heyward v. Maynard*, 119 App. Div. 66, 103 N. Y. S. 1028.

*Vermont*.—*Hutchinson v. Howard*, 15 Vt. 544.

*Wisconsin*.—*Howard v. Osceola*, 22 Wis. 453; *Dickinson v. Ritchie*, 50 Wis. 365, 7 N. W. 305.

<sup>6</sup> *Needles v. Smith*, 87 Fed. 316, 58 U. S. App. 276, 32 C. C. A. 226; *Gist v. Hanly*, 33 Ark. 233; *In re Sweeney*, 86 App. Div. 547, 83 N. Y. S. 680.

<sup>7</sup> *Howard v. Osceola*, 22 Wis. 453.

<sup>8</sup> *Gordon v. Hennings*, 89 Neb. 252, 131 N. W. 228.

<sup>9</sup> *Weber v. Werner*, 138 App. Div. 127, 122 N. Y. S. 943.

<sup>10</sup> *Matter of Stenton*, 53 Misc. 515, 105 N. Y. S. 295.

<sup>11</sup> *Hargett v. McCadden*, 107 Ga. 773, 33 S. E. 666.

<sup>12</sup> *Stewart v. Flowers*, 44 Miss. 518, 7 Am. Rep. 707.

<sup>13</sup> *Jackson v. Erkins*, 131 App. Div. 801, 116 N. Y. S. 385.

<sup>14</sup> *Curtis v. Richards*, 4 Idaho 434, 40 Pac. 57, 95 Am. St. Rep. 134; *Matter of H.*, 87 N. Y. 521, 63 How. Pr. 152; *In re Sweeney*, 86 App. Div. 547, 83 N. Y. S. 680.

<sup>15</sup> *Cory v. Harte*, 13 Daly (N. Y.) 147; *Newbert v. Cunningham*, 50 Me. 231, 79 Am. Dec. 612.

been held that the lien will attach to an execution in the hands of the attorney, and to the printed record on appeal,<sup>16</sup> and to money<sup>17</sup> and other personal property.<sup>18</sup>

### § 639. Possession Must Be Consistent with Lien.—

An attorney's possession of his client's property, in order that a retaining lien may accrue, must not be inconsistent with, or adverse to, his right to assert such lien.<sup>19</sup> If the property has been received for a purpose which is not consistent with the right to charge a lien thereon, such purpose must be carried out.<sup>20</sup> Thus,

<sup>16</sup> *In re Hollins*, 197 N. Y. 361, 90 N. E. 997. Compare *In re Bergstrom & Co.*, 131 App. Div. 791, 116 N. Y. S. 245.

<sup>17</sup> *United States*.—*In re Paschal*, 10 Wall. 483, 19 U. S. (L. ed.) 992.

*District of Columbia*.—*Meloy v. Meloy*, 24 App. Cas. 239.

*Louisiana*.—*Butchers' Union Slaughter-House & Live-Stock Landing Co. v. Crescent City Live-Stock Landing & Slaughter-House Co.*, 41 La. Ann. 355, 6 So. 508.

*Michigan*.—*Dowling v. Eggemann*, 47 Mich. 171, 10 N. W. 187.

*Minnesota*.—*Le Sueur First State Bank v. Sibley County Bank*, 96 Minn. 456, 105 N. W. 485, 489.

*Mississippi*.—*Stewart v. Flowers*, 44 Miss. 518, 7 Am. Rep. 707; *Halsell v. Turner*, 84 Miss. 432, 36 So. 531.

*Nebraska*.—*Van Etten v. State*, 24 Neb. 734, 40 N. W. 289, 1 L.R.A. 669; *Phillips v. Hogue*, 63 Neb. 192, 88 N. W. 180; *Burleigh v. Palmer*, 74 Neb. 122, 12 Ann. Cas. 777, 103 N. W. 1068.

*New York*.—*Bowling Green Sav. Bank v. Todd*, 52 N. Y. 489; *In re Knapp*, 85 N. Y. 284; *Matter of Smith*, 111 App. Div. 23, 35 Civ. Proc.

314, 97 N. Y. S. 171; *In re Ross*, 123 App. Div. 74, 107 N. Y. S. 899; *Arkenburgh v. Arkenburgh*, 27 Misc. 760, 59 N. Y. S. 612, *affirmed* 49 App. Div. 636, 64 N. Y. S. 742, 176 N. Y. 551, 68 N. E. 1114; *Rose v. Whiteman*, 52 Misc. 210, 101 N. Y. S. 1024.

*Ohio*.—*State v. Ampt*, 6 Ohio Dec. (Reprint) 699, 7 Am. L. Rec. 469; *Fargo Gas Light & Coke Co. v. Greer*, 10 Ohio Cir. Dec. 164, 18 Ohio Cir. Ct. 589.

*Pennsylvania*.—*Quakertown & E. R. Co. v. Guarantors Liability Indemnity Co.*, 206 Pa. St. 350, 55 Atl. 1033.

*Tennessee*.—*Read v. Bostick*, 6 Humph. 321.

<sup>18</sup> *Gist v. Hanly*, 33 Ark. 233; *Matter of Smith*, 111 App. Div. 23, 35 Civ. Proc. 314, 97 N. Y. S. 171.

<sup>19</sup> *Henry v. Fowler*, 3 Daly (N. Y.) 199; *Matter of Rowland*, 166 N. Y. 641, 60 N. E. 1120, *affirming* 55 App. Div. 66, 8 N. Y. Ann. Cas. 397, 66 N. Y. S. 1121; *Matter of Edward Ney Co.*, 114 App. Div. 497, 99 N. Y. S. 982; *Watts v. Newberry*, 107 Va. 233, 57 S. E. 657.

<sup>20</sup> *New York*.—*In re Hollins*, 197 N. Y. 361, 90 N. E. 997.

*Oregon*.—*State v. Lucas*, 24 Ore. 168, 33 Pac. 538.

where a testator delivered a will to his attorney with instructions to deposit it in a certain place, it was held that the possession of the attorney was that of a mere agent or messenger, and inconsistent with his right to claim a retaining lien.<sup>1</sup> Nor will lien rights exist as against property which comes into the possession of an attorney while acting in another capacity; thus, an attorney cannot hold property which came into his possession as an administrator, to secure the payment of his compensation for services rendered to the decedent during his lifetime.<sup>2</sup> And, *a fortiori*, an attorney cannot claim a lien on property the possession of which was fraudulently obtained by him.<sup>3</sup> Nor can an attorney retain stock which he caused to be placed in his name, knowing that it belonged to a third person and not to his client.<sup>4</sup> And where an executor's attorney secures possession of money of the estate, which was irregularly drawn from a bank, and seeks to retain it by virtue of an alleged lien for his services, the court may, in its discretion, direct him to redeposit it to the credit of the estate.<sup>5</sup> Nor can an attorney assert a lien as against property which he agreed to return.<sup>6</sup>

*Rhode Island*.—*Anderson v. Bosworth*, 15 R. I. 443, 8 Atl. 339, 2 Am. St. Rep. 910.

*Vermont*.—*Goodrich v. Mott*, 9 Vt. 395.

*Virginia*.—*Watts v. Newberry*, 107 Va. 233, 57 S. E. 657.

<sup>1</sup> *Bracher v. Olds*, 60 N. J. Eq. 449, 46 Atl. 770.

<sup>2</sup> *Newell v. West*, 149 Mass. 520, 21 N. E. 954; *De Lamater v. McCaskie*, 4 Dem. (N. Y.) 549.

<sup>3</sup> *Heyward v. Maynard*, 119 App. Div. 66, 103 N. Y. S. 1028.

<sup>4</sup> *Lindsley v. Caldwell*, 234 Mo. 498, 137 S. W. 983, 37 L.R.A. (N.S.) 161.

<sup>5</sup> *In re Rowland*, 55 App. Div. 66, 8 N. Y. Ann. Cas. 397, 66 N. Y. S. 1121, *affirmed* 166 N. Y. 641, 60 N. E. 1120.

<sup>6</sup> *Quakertown & E. R. Co. v. Guarantors' Liability Indemnity Co.*, 206 Pa. St. 350, 55 Atl. 1033.

## CHAPTER XXV.

### SETTLEMENT, DISMISSAL, SUBSTITUTION, ASSIGNMENT, AND SET-OFF, AS AFFECTING LIEN RIGHTS.

#### *Settlement.*

- § 640. Settlement before Judgment Generally.
- 641. Settlement where Lien Rights Exist.
- 642. Fraudulent Settlements.
- 643. Settlement Pending Appeal.
- 644. Effect of Contract for Part of Subject-Matter of Litigation.
- 645. Settlement after Judgment.

#### *Dismissal, Substitution, and Assignment.*

- 646. Dismissal.
- 647. Substitution.
- 648. Assignment of Judgment.
- 649. Assignment of Cause of Action.

#### *Set-off.*

- 650. Generally.
- 651. Set-off of One Judgment against Another.
- 652. Assignment of Judgment to Counsel as Affecting Right of Set-off.

#### *Settlement.*

§ 640. **Settlement before Judgment Generally.** — As a general rule, a client may settle his litigation with the adverse party prior to judgment without his attorney's consent, even though such settlement prevents the acquisition of an attorney's lien which would attach if the litigation had proceeded to judgment.<sup>1</sup>

<sup>1</sup>*United States*. — *Swanston v. Lincoln*, 1 Spr. 230, 20 Fed. Cas. No. Morning Star Min. Co., 4 McCrary 11,471; *Emma Silver Min. Co. v.* 241, 13 Fed. 215; *Peterson v. Wat-* Emma Silver Min. Co., 12 Fed. 815; son, Blatchf. & H. 487, 19 Fed. Cas. *Swanson v. Chicago, St. P. & K. C. R.* No. 11,037; *Brooks v. Snell*, 1 Spr. Co., 35 Fed. 638; *In re Baxter &* 48, 4 Fed. Cas. No. 1,961; *Purecell v.* Co., 154 Fed. 22, 83 C. C. A. 106.

The policy of the law favors the adjustment of claims and the termination of litigation, and the courts are not disposed to limit

*Alabama*.—Connor *v.* Boyd, 73 Ala. 385; Ex p. Randall, 149 Ala. 640, 42 So. 870.

*Arkansas*.—DeGraffenreid *v.* St. Louis S. W. R. Co., 66 Ark. 260, 50 S. W. 272.

*District of Columbia*.—Lamont *v.* Washington & Georgetown R. Co., 2 Mackey 502, 47 Am. Rep. 268.

*Georgia*.—Hawkins *v.* Loyless, 39 Ga. 5; Green *v.* Southern Exp. Co., 39 Ga. 20; Jones *v.* Morgan, 39 Ga. 310, 99 Am. Dec. 458; Harris *v.* Tison, 63 Ga. 629, 36 Am. Rep. 126.

*Illinois*.—Henchey *v.* Chicago, 41 Ill. 136; Cameron *v.* Boeger, 209 Ill. 84, 65 N. E. 690, 93 Am. St. Rep. 165.

*Indiana*.—Hanna *v.* Island Coal Co., 5 Ind. App. 163, 31 N. E. 846, 51 Am. St. Rep. 246.

*Iowa*.—Casar *v.* Sargeant, 7 Ia. 317; Ellwood *v.* Wilson, 21 Ia. 523.

*Kentucky*.—Wood *v.* Anders, 5 Bush 601; Rowe *v.* Fogle, 88 Ky. 105, 10 S. W. 426, 2 L.R.A. 708, 8 Ky. L. Rep. 697; Hubble *v.* Dunlap, 101 Ky. 419, 41 S. W. 432; Stewart *v.* L. & N. R. R. Co., 4 Ky. L. Rep. 718.

*Louisiana*.—Smith *v.* Vicksburg, S. & P. R. Co., 112 La. 985, 36 So. 826.

*Maine*.—Potter *v.* Mayo, 3 Greenl. 34, 14 Am. Dec. 211; Hobson *v.* Watson, 34 Me. 20, 56 Am. Dec. 632; Averill *v.* Longfellow, 66 Me. 237.

*Massachusetts*.—Gatchell *v.* Clark, 5 Mass. 309; Simmons *v.* Almy, 103 Mass. 33.

*Michigan*.—Parker *v.* Blighton, 32 Mich. 266; Wright *v.* Hake, 38 Mich. 525; Voight Brewery Co. *v.* Donovan, 103 Mich. 190, 61 N. W. 343.

*Minnesota*.—Nielsen *v.* Albert Lea, 91 Minn. 388, 392, 98 N. W. 195,

197; Boogren *v.* St. Paul City R. Co., 97 Minn. 51, 106 N. W. 104, 114 Am. St. Rep. 691, 3 L.R.A.(N.S.) 379, *Mississippi*.—Mosely *v.* Jamison, 71 Miss. 456, 14 So. 529.

*Missouri*.—Alexander *v.* Grand Ave. R. Co., 54 Mo. App. 66.

*Nebraska*.—Aspinwall *v.* Sabin, 22 Neb. 73, 34 N. W. 72; Williams *v.* Miles, 63 Neb. 851, 89 N. W. 455.

*New Hampshire*.—Young *v.* Dearborn, 27 N. H. 327.

*New Jersey*.—Den *v.* Heister, 17 N. J. L. 438; Weller *v.* Jersey City, H. & P. St. R. Co., 66 N. J. Eq. 11, 57 Atl. 730, *affirmed* 68 N. J. Eq. 659, 6 Ann. Cas. 442, 61 Atl. 459.

*New York*.—Roberts *v.* Doty, 31 Hun 128; Quinlan *v.* Birge, 43 Hun 483, 7 N. Y. St. Rep. 147; Pitcher *v.* Robertson, 66 Hun 632 mem., 21 N. Y. S. 66; Stahl *v.* Wadsworth, 13 Civ. Proc. 32, 10 N. Y. St. Rep. 228; Roediger *v.* Simmons, 2 Abb. N. Cas. 279; Wade *v.* Orton, 12 Abb. Pr. N. S. 444; Pearl *v.* Robitchek, 2 Daly 138; Anonymous, 2 Daly 533; Benedict *v.* Harlow, 5 How. Pr. 347; Sullivan *v.* O'Keefe, 53 How. Pr. 426; Talcott *v.* Bronson, 4 Paige 501; Sweet *v.* Bartlett, 4 Sandf. 661; Coughlin *v.* New York Cent. & H. R. R. Co., 71 N. Y. 443, 27 Am. Rep. 75, *reversing* 8 Hun 136; Goldstein *v.* Nassau Electric R. Co., 157 App. Div. 226, 141 N. Y. S. 805; Publishers' Printing Co. *v.* Gillin Printing Co., 38 N. Y. S. 784.

*North Dakota*.—Olson *v.* Sargent County, 15 N. D. 146, 107 N. W. 43.

*Ohio*.—Connell *v.* Brumbaek, 10 Ohio Cir. Dec. 149, 18 Ohio Cir. Ct. 502.



the right of parties in this respect. It is true, of course, that this practice may occasionally work a hardship upon attorneys, but, nevertheless, it is a salutary rule.<sup>2</sup> Indeed, in most jurisdictions a contract preventing or restricting the client's right to dispose of his litigation is void or voidable on grounds of public policy,<sup>3</sup> and this is especially true of contracts which affect the marital relations.<sup>4</sup> Such settlement, however, does not prevent the recovery by the attorney of his taxable costs;<sup>5</sup> and although a litigant has the absolute right to make a bona fide settlement of his cause of action, either before or after verdict, without the knowledge or consent of his attorney, it is held that, after a verdict has been obtained fixing the amount of the cause of action, a collusive settlement made

*Oklahoma.*—Wells Fargo & Co. v. Moore, 31 Okla. 135, 120 Pac. 612.

*Oregon.*—Jackson v. Stearns, 48 Ore. 25, 84 Pac. 798, 5 L.R.A.(N.S.) 390; Wagner v. Goldschmidt, 51 Ore. 63, 93 Pac. 689.

*Rhode Island.*—Tyler v. Superior Ct., 30 R. I. 107, 73 Atl. 467, 23 L.R.A.(N.S.) 1045.

*South Carolina.*—Miller v. Newell, 20 S. C. 123, 47 Am. Rep. 833.

*South Dakota.*—Howard v. Ward, 139 N. W. 771.

*Tennessee.*—Johnson v. Story, 1 Lea 114; Stephens v. Nashville, C. & St. L. R., 10 Lea 448; Sharpe v. Allen, 11 Lea 518; Covington v. Bass, 88 Tenn. 496, 12 S. W. 1033.

*Texas.*—Whittaker v. Clarke, 33 Tex. 647.

*Vermont.*—Foot v. Tewksbury, 2 Vt. 97; Hutchinson v. Howard, 15 Vt. 544; Hutchinson v. Pettes, 18 Vt. 614; Hooper v. Welch, 43 Vt. 169, 5 Am. Rep. 267.

*Washington.*—Plummer v. Great Northern R. Co., 60 Wash. 214, 110 Pac. 989, 31 L.R.A.(N.S.) 1215.

*Wisconsin.*—Kusterer v. Beaver Atty. at L. Vol. II.—66.

Dam, 56 Wis. 471, 14 N. W. 617, 43 Am. Rep. 725.

<sup>2</sup>Boogren v. St. Paul City R. Co., 97 Minn. 51, 106 N. W. 104, 114 Am. St. Rep. 691, 3 L.R.A.(N.S.) 379.

<sup>3</sup>See *supra*, § 435.

<sup>4</sup>Hillman v. Hillman, 42 Wash. 595, 85 Pac. 61, 114 Am. St. Rep. 135. And see also *supra*, § 437.

<sup>5</sup>And see also *supra*, §§ 484-486, as to taxable costs, statutory fees, and expenses generally.

*United States.*—Angell v. Bennett, 1 Spr. 85, 1 Fed. Cas. No. 387; Collins v. Nickerson, 1 Spr. 126, 6 Fed. Cas. No. 3,016; Gaines v. Travis, Abb. Adm. 297, 9 Fed. Cas. No. 5,179; The Victory, 1 Blatchf. 443, 28 Fed. Cas. No. 16,937.

*Maine.*—Cooly v. Patterson, 52 Me. 472.

*New York.*—Bradt v. Koon, 4 Cow. 416; Harris v. Cnff, 48 Hun 617 mem., 15 Civ. Proc. 104, 1 N. Y. S. 349; Minto v. Baur, 17 Civ. Proc. 314, 6 N. Y. S. 444.

*South Carolina.*—Scharlock v. Oland, 1 Rich. L. 207.

*Wisconsin.*—Garvin v. Crowley, 116 Wis. 496, 93 N. W. 470.

to defraud the attorney of his compensation, does not limit the extent of such attorney's lien to the amount actually paid upon such collusive settlement.<sup>6</sup>

**§ 641. Settlement Where Lien Rights Exist.**—As shown heretofore, lien rights exist in favor of an attorney prior to judgment in several jurisdictions; thus, for instance, he may have a lien on the cause of action,<sup>7</sup> or on money in the hands of the adverse party or some other person,<sup>8</sup> or on other property involved in the litigation.<sup>9</sup> But it is well settled that the existence of such lien rights does not prevent litigants from amicably adjusting their differences without the consent of counsel; in such cases, however, the attorney's lien is not lost,<sup>10</sup> but, on the contrary, it

<sup>6</sup> *Desaman v. Butler*, 118 Minn. 198, 136 N. W. 747.

<sup>7</sup> See *supra*, §§ 613-617.

<sup>8</sup> See *supra*, §§ 618-626.

<sup>9</sup> See *supra*, §§ 627-633.

<sup>10</sup> *United States*.—In *re Baxter & Co.*, 154 Fed. 22, 83 C. C. A. 106. *California*.—*Stockton Sav. & Loan Soc. v. Donnelly*, 60 Cal. 481.

*Georgia*.—*Brown v. Georgia, C. & N. R. Co.*, 101 Ga. 80, 28 S. E. 634; *Johnson v. McCurry*, 102 Ga. 471, 31 S. E. 88; *Georgia R., etc., Co. v. Crosby*, 78 S. E. 612.

*Illinois*.—*Standidge v. Chicago R. Co.*, 254 Ill. 524, Ann. Cas. 1913C 65, 98 N. E. 963, 40 L.R.A.(N.S.) 529; *Sutton v. Chicago R. Co.*, 258 Ill. 551, 101 N. E. 940.

*Iowa*.—*Barnabee v. Holmes*, 115 Ia. 581, 88 N. W. 1098.

*Kansas*.—*Anderson v. Metropolitan St. R. Co.*, 10 Kan. App. 575 mem., 61 Pac. 982.

*Kentucky*.—*Proctor Coal Co. v. Tye*, 96 S. W. 512, 29 Ky. L. Rep. 804.

*Michigan*.—*Kilbourne v. Wiley*, 124 Mich. 370, 83 N. W. 99, 7 Detroit Leg. N. 269.

*Missouri*.—*O'Connor v. St. Louis Transit Co.*, 198 Mo. 622, 8 Ann. Cas. 703, 97 S. W. 150, 15 Am. St. Rep. 495; *Taylor v. St. Louis Transit Co.*, 198 Mo. 715, 98 S. W. 155; *Wait v. Atchison, T. & S. F. R. Co.*, 204 Mo. 491, 103 S. W. 60; *Taylor v. St. Louis Merchants' Bridge Terminal R. Co.*, 207 Mo. 495, 105 S. W. 740; *Young v. Renshaw*, 102 Mo. App. 173, 76 S. W. 701; *Yonge v. St. Louis Transit Co.*, 109 Mo. App. 235, 84 S. W. 184; *Conkling v. Austin*, 111 Mo. App. 292, 86 S. W. 911; *Curtis v. Metropolitan St. R. Co.*, 118 Mo. App. 341, 94 S. W. 762; *Curtis v. Metropolitan St. R. Co.*, 125 Mo. App. 369, 102 S. W. 62; *Boyle v. Metropolitan St. R. Co.*, 134 Mo. App. 71, 114 S. W. 558; *Boyd v. G. W. Chase & Son Mercantile Co.*, 135 Mo. App. 115, 115 S. W. 1052; *Carter v. Chicago, B. & Q. R. Co.*, 136 Mo. App. 719, 119 S. W. 35; *Whitwell v. Aurora*, 139 Mo. App. 597, 123 S. W. 1045; *United Rys. Co. v. O'Connor*, 153 Mo. App. 128, 132 S. W. 262.

*Nebraska*.—*Lewis v. Omaha St. R. Co.*, 114 N. W. 281.

*New York*.—N. Y. Judiciary Law

attaches to the settlement,<sup>11</sup> the money received in settlement being

475; *Brown v. Comstock*, 10 Barb. 67; *Lee v. Vacuum Oil Co.*, 126 N. Y. 579, 27 N. E. 1018; *Poole v. Belcha*, 131 N. Y. 200, 30 N. E. 53; *Peri v. New York Cent. & H. R. R. Co.*, 152 N. Y. 521, 46 N. E. 849, *affirming* 12 App. Div. 625, 43 N. Y. S. 1162; *Fischer-Hansen v. Brooklyn Heights R. Co.*, 173 N. Y. 492, 66 N. E. 395; *Harris v. Cuff*, 48 Hun 617 mem., 1 N. Y. S. 349; *Hart v. New York*, 69 Hun 237, 23 N. Y. S. 555, *affirmed* 139 N. Y. 610, 35 N. E. 204; *White v. Sumner*, 16 App. Div. 70, 44 N. Y. S. 692; *Zaitz v. Metropolitan St. R. Co.*, 52 App. Div. 626, 65 N. Y. S. 395; *Evans v. Muller*, 74 App. Div. 630, 77 N. Y. S. 1027; *Rogers v. Marcus*, 93 App. Div. 553, 87 N. Y. S. 941, *reversing* 40 Misc. 442, 82 N. Y. S. 707; *Oishei v. Pennsylvania R. Co.*, 117 App. Div. 110, 102 N. Y. S. 368; *Knickerbocker Inv. Co. v. Voorhees*, 128 App. Div. 639, 112 N. Y. S. 842; *Canary v. Russell*, 10 Misc. 597, 24 Civ. Proc. 109, 31 N. Y. S. 291; *Williams v. Wilson*, 18 Misc. 42, 75 N. Y. St. Rep. 451, 40 N. Y. S. 1132; *Schriever v. Brooklyn Heights R. Co.*, 30 Misc. 145, 30 Civ. Proc. 67, 61 N. Y. S. 644, 890, *modified* 49 App. Div. 629, 63 N. Y. S. 217; *Fenwick v. Mitchell*, 34 Misc. 617, 70 N. Y. S. 667, *reversed* 64 App. Div. 621, 72 N. Y. S. 1102; *Cohn v. Polstein*, 41 Misc. 431, 84 N. Y. S. 1072; *Witmark v. Perley*, 43 Misc. 14, 86 N. Y. S. 756; *Van Der Beek v. Thomason*, 50 Misc. 524, 99 N. Y. S. 538; *Davis v. Bowe*, 54 Super. Ct. 520, 3 N. Y. St. Rep. 530; *Crouch v. Hoyt*, 24 Civ. Proc. 60, 1 N. Y. Ann. Cas. 76, 30 N. Y. S. 406; *Adsit v. Hall*, 3 How. Pr. N. S. 373; *In re*

*Kaufman*, 113 N. Y. S. 525. See also *Meighan v. American Grass Twine Co.*, 154 Fed. 346, 83 C. C. A. 124 (decided under the New York statute).

*Ohio*.—*Connell v. Brumback*, 10 Ohio Cir. Dec. 149, 18 Ohio Cir. Ct. 502.

*Oregon*.—*Stearns v. Wollenberg*, 51 Ore. 88, 92 Pac. 1079, 14 L.R.A. (N.S.) 1095.

*Tennessee*.—*Illinois Cent. R. Co. v. Wells*, 104 Tenn. 706, 59 S. W. 1041; *Tompkins v. Nashville, C. & St. L. R. Co.*, 110 Tenn. 157, 72 S. W. 116, 100 Am. St. Rep. 795, 61 L.R.A. 340; *Ingersoll v. Coal Creek Coal Co.*, 117 Tenn. 263, 10 Ann. Cas. 829, 98 S. W. 178, 119 Am. St. Rep. 1003, 9 L.R.A. (N.S.) 282.

*Utah*.—Comp. Laws of Utah, § 135.

*Washington*.—*McRea v. Warehime*, 49 Wash. 194, 94 Pac. 924.

*Wisconsin*.—*Rice v. Garnhart*, 35 Wis. 282; *Kusterer v. Beaver Dam*, 56 Wis. 471, 14 N. W. 617, 43 Am. Rep. 725.

<sup>11</sup>*Illinois*.—*Sutton v. Chicago R. Co.*, 258 Ill. 551, 101 N. E. 940.

*Missouri*.—*Conkling v. Austin*, 111 Mo. App. 292, 86 S. W. 911; *Belch v. Schott*, 157 S. W. 658.

*New York*.—*Fischer-Hansen v. Brooklyn Heights R. Co.*, 173 N. Y. 492, 66 N. E. 395, *reversing* 63 App. Div. 356, 71 N. Y. S. 513; *Oishei v. Pennsylvania R. Co.*, 117 App. Div. 110, 119, 102 N. Y. S. 368, 374, *affirmed* 191 N. Y. 544, 85 N. E. 1113; *Canary v. Russell*, 10 Misc. 597, 24 Civ. Proc. 109, 31 N. Y. S. 291; *Fenwick v. Mitchell*, 34 Misc. 617, 70 N. Y. S. 667, *reversed* 64 App. Div.

deemed to have been "recovered."<sup>12</sup> In providing for attorney's liens of the character under consideration it was not intended to prevent the honest settlement of matters in dispute by the parties themselves, otherwise such statutes would be, to say the least, of doubtful validity;<sup>13</sup> but the purpose was to prevent the settlement of litigation out of court so as to defeat the collection of fees for professional services rendered.<sup>14</sup> And it has been held that, even in the absence of statute, the court has inherent power to protect counsel in this respect should the circumstances warrant the exercise thereof.<sup>15</sup> In most jurisdictions, however, an attorney's charging lien is only effective when the adverse party has had notice thereof.<sup>16</sup>

§ 642. **Fraudulent Settlements.** — The rule that courts look with favor upon a compromise and settlement made by the parties to a suit with the consent of all persons concerned, to prevent the vexation and expense of further litigation, applies only where the rights and interests of all parties have been respected and good faith observed;<sup>17</sup> and, therefore, a settlement entered into for the purpose of defrauding an attorney out of his compensation will not be upheld.<sup>18</sup> Settlements made out of court, it has been said,

621, 72 N. Y. S. 1102; *Witmark v. Perley*, 43 Misc. 14, 86 N. Y. S. 756; *In re Kaufman*, 113 N. Y. S. 525.

*Tennesse*.—*Illinois Cent. R. Co. v. Wells*, 104 Tenn. 707, 59 S. W. 1043; *Tompkins v. Nashville, C. & St. L. R. Co.*, 110 Tenn. 157, 72 S. W. 116, 100 Am. St. Rep. 795, 61 L.R.A. 340. *Compare* *Humtulsips Driving Co. v. Cross*, 65 Wash. 636, 118 Pac. 827, 37 L.R.A.(N.S.) 226.

<sup>12</sup> *Standidge v. Chicago R. Co.*, 254 Ill. 524, Ann. Cas. 1913C 65, 98 N. E. 963, 40 L.R.A.(N.S.) 529.

<sup>13</sup> See *supra*, § 435.

<sup>14</sup> *Tompkins v. Nashville, C. & St. L. R. Co.*, 110 Tenn. 157, 72 S. W. 116, 100 Am. St. Rep. 795, 61 L.R.A. 340.

<sup>15</sup> *Stearns v. Wollenberg*, 51 Ore.

88, 92 Pac. 1079, 14 L.R.A.(N.S.) 1095. See also *supra*, § 613.

<sup>16</sup> *Newport Rolling Mill Co. v. Hall*, 147 Ky. 598, 144 S. W. 760. And see *supra*, §§ 600-605.

<sup>17</sup> *Weeks v. Wayne Circuit Judges*, 73 Mich. 256, 41 N. W. 269.

<sup>18</sup> *United States*.—*Angell v. Bennett*, 1 Spr. 85, 1 Fed. Cas. No. 387; *Johnson v. A Raft of Spars*, 13 Fed. Cas. No. 7,370a; *Swanson v. Chicago, St. P. & K. C. R. Co.*, 35 Fed. 638.

*Georgia*.—*McDonald v. Napier*, 14 Ga. 89.

*Illinois*.—*North Chicago St. R. Co. v. Ackley*, 58 Ill. App. 572.

*Indiana*.—*Miedreich v. Rank*, 40 Ind. App. 393, 82 N. E. 117.

*Kentucky*.—*Rowe v. Fogle*, 88 Ky. 105, 10 S. W. 426, 2 L.R.A. 708;

will be viewed with suspicion, and closely scrutinized for fraud,<sup>19</sup> as the court is bound to shield its attorneys, as well as litigants, from transactions so tainted.<sup>20</sup> Indeed, attorney's liens are based on the idea that counsel should not be deprived of their compensation by the unfair conduct of their clients;<sup>1</sup> and in some jurisdictions it is expressly provided by statute that good faith must exist in settlements between the parties.<sup>2</sup> What constitutes fraud must, of course, depend on the facts of the particular case: thus, it has been held that it is a fraud upon counsel for a client to settle a suit without his knowledge, withhold his fees, and then set up the statute of limitations.<sup>3</sup> So, it has been held that the settlement of an action without adequate consideration is, in itself, evidence of bad faith.<sup>4</sup> But one who has participated in a collusive settlement of his litigation cannot thereafter complain on his attorney's account.<sup>5</sup>

*Hubble v. Dunlap*, 101 Ky. 419, 41 S. W. 432.

*Minnesota*.—See *Desaman v. Butler*, 118 Minn. 198, 136 N. W. 747.

*Missouri*.—*Curtis v. Metropolitan St. R. Co.*, 118 Mo. App. 341, 94 S. W. 762.

*Nebraska*.—*Zentmire v. Brailey*, 89 Neb. 158, 130 N. W. 1047.

*New Hampshire*.—*Young v. Dearborn*, 27 N. H. 324. See also *Christie v. Sawyer*, 44 N. H. 298.

*New Jersey*.—*Den v. Heister*, 17 N. J. L. 438.

*New York*.—*Payn v. Parks*, 1 How. Pr. 94; *Marquat v. Mulvy*, 9 How. Pr. 460; *Dietz v. McCallum*, 44 How. Pr. 493; *Martin v. Hawks*, 15 Johns. 405; *Kuehn v. Syracuse Rapid Transit R. Co.*, 183 N. Y. 456, 76 N. E. 589, reversing 104 App. Div. 589, 93 N. Y. S. 883.

*Utah*.—*Potter v. Ajax Min. Co.*, 19 Utah 421, 57 Pac. 270.

*West Virginia*.—*Burkhart v. Scott*, 69 W. Va. 694, 72 S. E. 784.

*Wisconsin*.—*Voell v. Kelly*, 64 Wis. 504, 25 N. W. 536.

*Canada*.—*Stewart v. Hall*, 17 Manitoba 653.

<sup>19</sup> *Miedreich v. Rank*, 40 Ind. App. 393, 82 N. E. 117; *Falconio v. Larsen*, 31 Ore. 137, 48 Pac. 703, 37 L.R.A. 254. *Compare Plummer v. Great Northern R. Co.*, 60 Wash. 214, 110 Pac. 989, 31 L.R.A. (N.S.) 1215.

<sup>20</sup> *Marquat v. Mulvy*, 9 How. Pr. (N. Y.) 460.

<sup>1</sup> *In re Baxter*, 154 Fed. 22, 83 C. C. A. 106. And see also *supra*, § 580.

<sup>2</sup> *Hubble v. Dunlap*, 101 Ky. 419, 41 S. W. 432, 19 Ky. L. Rep. 656; *Proctor Coal Co. v. Tye*, 123 Ky. 381, 96 S. W. 512, 29 Ky. L. Rep. 804.

<sup>3</sup> *Lichty v. Hugus*, 55 Pa. St. 434.

<sup>4</sup> *Jackson v. Stearns*, 48 Ore. 25, 84 Pac. 798, 5 L.R.A. (N.S.) 390.

<sup>5</sup> *McBratney v. Rome, W. & O. R. Co.*, 87 N. Y. 467.

§ 643. **Settlement Pending Appeal.** — The fact that an appeal is pending does not affect a client's right to settle with his adversary,<sup>6</sup> providing he does so in good faith;<sup>7</sup> but where lien rights exist as to the cause of action, such settlements do not affect the attorney's lien.<sup>8</sup> And in some jurisdictions the prosecution of an appeal does not vacate the judgment entered below, nor affect the attorney's lien thereon.<sup>9</sup>

§ 644. **Effect of Contract for Part of Subject-Matter of Litigation.** — The fact that a contract for compensation entitles the attorney to a portion of the recovery does not, as a general rule, prevent the parties from adjusting their differences amicably without reference to the contract;<sup>10</sup> but in some jurisdictions contracts of this character are given the effect of a lien upon the cause of action, on the theory that they operate as equitable assignments; and in others they are sanctioned by statute, so that, in either case, an attorney, having such a contract, is protected against settlement by his client,<sup>11</sup> providing, of course, that the adverse party

<sup>6</sup> *Iowa*.—*Winslow v. Central Iowa R. Co.*, 71 Ia. 197, 32 N. W. 330.

*Kentucky*.—*Louisville & N. R. Co. v. Proctor*, 51 S. W. 591, 21 Ky. L. Rep. 447; *Bell v. Wood*, 7 Ky. L. Rep. 516.

*Massachusetts*.—*Getchell v. Clark*, 5 Mass. 309.

*Missouri*.—*Stephens v. Metropolitan St. R. Co.*, 157 Mo. App. 656, 138 S. W. 904.

*New York*.—*Brown v. Comstock*, 10 Barb. 67, 3 Code Rep. 142; *McDowell v. Appleby*, 1 How. Pr. 229; *Sweet v. Bartlett*, 4 Sandf. 661; *Pulver v. Harris*, 52 N. Y. 73.

*Tennessee*.—*Johnson v. Story*, 1 Lea 114; *Covington v. Bass*, 88 Tenn. 198, 12 S. W. 1033.

<sup>7</sup> See *supra*, § 642.

<sup>8</sup> *Dodge v. Schell*, 20 Blatchf. (U. S.) 517; *Walker v. Equitable Mortg. Co.*, 114 Ga. 862, 40 S. E. 1010; *Kirby*

*v. La Dow*, 102 Mich. 345, 60 N. W. 761; *Sweet v. Bartlett*, 4 Sandf. (N. Y.) 661. And see also *supra*, § 641.

<sup>9</sup> *Covington v. Bass*, 88 Tenn. 496, 12 S. W. 1033. And see *infra*, § 645.

<sup>10</sup> *Arkansas*.—*De Graffenreid v. St. Louis S. W. R. Co.*, 66 Ark. 260, 50 S. W. 272.

*Iowa*.—*Larned v. Dubuque*, 86 Ia. 166, 53 N. W. 105; *Barnabee v. Holmes*, 115 Ia. 581, 88 N. W. 1098.

*Minnesota*.—*Nielsen v. Albert Lea*, 91 Minn. 388, 98 N. W. 195; *Boorgen v. St. Paul City R. Co.*, 97 Minn. 51, 106 N. W. 104, 114 Am. St. Rep. 691, 3 L.R.A.(N.S.) 379.

*Mississippi*.—*Mosely v. Jamison*, 71 Miss. 456, 14 So. 529.

*Washington*.—*McRea v. Warehime*, 49 Wash. 194, 94 Pac. 924.

<sup>11</sup> *California*.—*Stockton Savings & Loan Soc. v. Donnelly*, 60 Cal. 481.

has notice of the existence of the contract, or, where they are regulated by statute, that the statutory requirements have been complied with.<sup>12</sup> After a judgment has been entered, one having notice of an assignment, or contract equivalent to an assignment, in favor of the plaintiff's attorney, cannot defeat the attorney's rights in the premises by making payment to the plaintiff in person without the attorney's knowledge.<sup>13</sup>

**§ 645. Settlement after Judgment.**—A charging lien accrues in favor of an attorney, in most jurisdictions, as against a judgment or decree recovered by him for his client;<sup>14</sup> and such lien will not be affected by the payment of the amount due, or any part thereof, to the plaintiff by one who knows, or should have known, of the existence of the lien;<sup>15</sup> and it has been held that,

*Georgia*.—*Jones v. Groover*, 46 Ga. 568; *Twiggs v. Chambers*, 56 Ga. 279.

*Kentucky*.—*Skaggs v. Hill*, 14 S. W. 363.

*Michigan*.—*Grand Rapids & I. R. Co. v. Cheboygan Circuit Judge*, 161 Mich. 181, 126 N. W. 56, 137 Am. St. Rep. 495, 17 Detroit Leg. N. 270.

*Missouri*.—*Wait v. Atchison, T. & S. F. R. Co.*, 204 Mo. 491, 103 S. W. 60.

*Nebraska*.—*Lavender v. Atkins*, 20 Neb. 206, 29 N. W. 467.

*Texas*.—*Powell v. Galveston, H. & S. A. R. Co.*, 78 S. W. 975; *St. Louis & S. F. R. R. Co. v. Dysart*, 130 S. W. 1047.

*Wisconsin*.—*Rice v. Garnhart*, 35 Wis. 282.

<sup>12</sup> *Connell v. Brumback*, 10 Ohio Cir. Dec. 149, 18 Ohio Cir. Ct. 502; *Stearns v. Wollenberg*, 51 Ore. 88, 92 Pac. 1079, 14 L.R.A.(N.S.) 1095; *McRea v. Warehime*, 49 Wash. 194, 94 Pac. 924.

<sup>13</sup> *Ross v. C. R. I. & P. R. Co.*, 55 Ia. 691, 8 N. W. 644; *Louisville & N. R. Co. v. Proctor*, 51 S. W. 591,

21 Ky. L. Rep. 447; *Weeks v. Wayne Circuit Judges*, 73 Mich. 256, 41 N. W. 269; *Kilbourne v. Wiley*, 124 Mich. 370, 83 N. W. 99, 7 Detroit Leg. N. 269.

<sup>14</sup> See *supra*, §§ 634-637.

<sup>15</sup> *United States*.—*Foster v. Danforth*, 59 Fed. 750.

*Colorado*.—*Johnson v. McMillan*, 13 Colo. 423, 22 Pac. 769; *Flint v. Hubbard*, 16 Colo. App. 464, 66 Pac. 446.

*Connecticut*.—*Andrews v. Morse*, 12 Conn. 444, 31 Am. Dec. 752.

*Georgia*.—*McDonald v. Napier*, 14 Ga. 89.

*Iowa*.—*Fisher v. Oskaloosa*, 28 Ia. 381; *Brainard v. Elwood*, 53 Ia. 30, 3 N. W. 799; *Winslow v. Central Iowa R. Co.*, 71 Ia. 197, 32 N. W. 330; *Larned v. Dubnque*, 86 Ia. 166, 53 N. W. 105; *Parsons v. Hawley*, 92 Ia. 175, 60 N. W. 520; *Wallace v. Chicago, M. & St. P. R. Co.*, 112 Ia. 565, 84 N. W. 662.

*Kentucky*.—*Stephens v. Farrar*, 4 Bush 13; *Louisville & N. R. Co. v. Proctor*, 51 S. W. 591.

so far as the question of the attorney's lien is concerned, the judgment exists from the time the court orders the entry thereof.<sup>16</sup> Of course, there is nothing to prevent the defendant from making payment to the plaintiff personally, and obtaining a satisfaction of the judgment subject to the attorney's lien;<sup>17</sup> and where the efficacy of the lien is dependent on notice, the absence thereof will warrant the payment of the judgment debt to the plaintiff, and such payment will relieve the defendant from any subsequent claim of lien by the plaintiff's attorney.<sup>18</sup> Nor will the fact that

*Louisiana*.—Safford *v.* Carroll, 23 La. Ann. 382.

*Maine*.—Gammon *v.* Chandler, 30 Me. 152; Bickford *v.* Ellis, 50 Me. 121; Newbert *v.* Cunningham, 50 Me. 231, 79 Am. Dec. 612; Cooly *v.* Paterson, 52 Me. 472; McKenzie *v.* Wardwell, 61 Me. 136; Stratton *v.* Hussey, 62 Me. 286.

*Michigan*.—Weeks *v.* Wayne Circuit Judges, 73 Mich. 256, 41 N. W. 269; Millard *v.* Jordan, 76 Mich. 131, 42 N. W. 1085; Lindner *v.* Hine, 84 Mich. 511, 48 N. W. 43.

*Minnesota*.—Northrup *v.* Hayward, 102 Minn. 307, 12 Ann. Cas. 341, 113 N. W. 701.

*Nebraska*.—Jones *v.* Duff Grain Co., 69 Neb. 91, 95 N. W. 1.

*New Jersey*.—Barnes *v.* Taylor, 30 N. J. Eq. 467; Braden *v.* Ward, 42 N. J. L. 521.

*New York*.—Martin *v.* Hawks, 15 Johns. 405; Talcott *v.* Bronson, 4 Paige 591; Ten Broeck *v.* De Witt, 10 Wend. 617; Adams *v.* Fox, 40 Barb. 442; Pinder *v.* Morris, 3 Caines 165; Power *v.* Kent, 1 Cow. 172; Hall *v.* Ayer, 19 How. Pr. 91, 9 Abb. Pr. 220; Fox *v.* Fox, 24 How. Pr. 409; In re Bailey, 66 How. Pr. 64; Crotty *v.* McKenzie, 42 Super. Ct. 192; Woolf *v.* Jacobs, 45 Super. Ct. 583; In re Bailey, 4 Civ. Proc. 140;

Hommeyer *v.* Beere, 13 Civ. Proc. 169; Johnson *v.* Anderson, 1 Code Rep. N. S. 209 note; Eberhardt *v.* Schuster, 10 Abb. N. Cas. 374; Rooney *v.* Second Ave. R. Co., 18 N. Y. 368; Pulver *v.* Harris, 52 N. Y. 73; Bailey *v.* Murphy, 136 N. Y. 50, 32 N. E. 627, affirming 51 Hun 643 mem., 4 N. Y. S. 579; Commercial Telegram Co. *v.* Smith, 57 Hun 176, 19 Civ. Proc. 32, 10 N. Y. S. 433; Roberts *v.* Union El. R. Co., 84 Hun 437, 32 N. Y. S. 387; Baxter *v.* Connor, 119 App. Div. 450, 104 N. Y. S. 327; Bloch *v.* Bloch, 136 App. Div. 770, 121 N. Y. S. 475; Vrooman *v.* Pickering, 25 Misc. 277, 28 Civ. Proc. 302, 54 N. Y. S. 389.

*South Dakota*.—Leighton *v.* Serveson, 8 S. D. 350, 66 N. W. 938.

*Tennessee*.—Covington *v.* Bass, 88 Tenn. 496, 12 S. W. 1033.

*Vermont*.—Hutchinson *v.* Pettes, 18 Vt. 614; Hooper *v.* Welch, 43 Vt. 169, 5 Am. Rep. 268.

*West Virginia*.—Renick *v.* Ludington, 16 W. Va. 378. See also *supra*, § 643, as to settlement pending appeal.

<sup>16</sup> Young *v.* Dearborn, 27 N. H. 324.

<sup>17</sup> Boyle *v.* Metropolitan St. R. Co., 134 Mo. App. 71, 114 S. W. 558.

<sup>18</sup> Colorado State Bank *v.* Davidson,



a lien exists in favor of the plaintiff's attorney, affect any substantial right of the adverse party, as, for instance, the right to discharge the indebtedness with depreciated funds.<sup>19</sup>

*Dismissal, Substitution, and Assignment.*

§ 646. **Dismissal.**—Where lien rights exist in favor of an attorney as against his client's cause of action,<sup>20</sup> or as against money and funds in the hands of the adverse party or some other person,<sup>1</sup> or as against any other subject-matter of litigation,<sup>2</sup> a litigant will not, as a general rule, be permitted to discontinue or dismiss his action to the prejudice of the attorney's rights in the premises;<sup>3</sup> and this is particularly true after judgment has been entered.<sup>4</sup> In some jurisdictions, however, a dismissal will be al-

7 Colo. App. 91, 42 Pac. 687; *Hawkins v. Loyless*, 39 Ga. 5; *Green v. Southern Exp. Co.*, 39 Ga. 20; *Florida Cent. & P. R. Co. v. Ragan*, 104 Ga. 353, 30 S. E. 745; *Pinder v. Morris, Coleman & C. Cas.* (N. Y.) 489.

<sup>19</sup> *Neil v. Staten*, 7 Heisk. (Tenn.) 290.

<sup>20</sup> See *supra*, §§ 613-617.

<sup>1</sup> See *supra*, §§ 618-626.

<sup>2</sup> See *supra*, §§ 627-633.

<sup>3</sup> *Georgia*.—*Twiggs v. Chambers*, 56 Ga. 279.

*Indiana*.—See *Miedreich v. Rank*, 40 Ind. App. 393, 82 N. E. 117.

*Kansas*.—*Root v. Topeka Water Supply Co.*, 46 Kan. 183, 189, 26 Pac. 398, 400.

*Kentucky*.—*Skaggs v. Hill*, 14 S. W. 363.

*Michigan*.—*Heavenrich v. Alpena Circuit Judge*, 111 Mich. 163, 69 N. W. 226, 3 Detroit Leg. N. 641.

*Nebraska*.—*Williams v. Miles*, 63 Neb. 851, 89 N. W. 455.

*New Hampshire*.—*Yongg v. Dearborn*, 27 N. H. 324.

*New York*.—*Kuehn v. Syracuse*

*Rapid Transit R. Co.*, 104 App. Div. 580, 93 N. Y. S. 883, *affirmed* 186 N. Y. 567, 79 N. E. 1109, *previously reversed* on other grounds, 183 N. Y. 456, 76 N. E. 589; *Stilwell v. Armstrong*, 28 Misc. 546, 59 N. Y. S. 671; *Pickard v. Yeneer*, 10 N. Y. Wkly. Dig. 271; *Eberhardt v. Schuster*, 10 Abb. N. Cas. 374; *Owen v. Mason*, 18 How. Pr. 156; *Dietz v. McCallum*, 44 How. Pr. 493.

*South Carolina*.—*Miller v. Newell*, 20 S. C. 123, 47 Am. Rep. 833.

*Tennessee*.—*Pleasants v. Kortrecht*, 5 Heisk. 694; *Covington v. Bass*, 88 Tenn. 498, 12 S. W. 1033.

*Wisconsin*.—*Howard v. Osecola*, 22 Wis. 453.

<sup>4</sup> *United States*.—*Dodge v. Schell*, 20 Blatchf. 517; *Foster v. Danforth*, 59 Fed. 750.

*Colorado*.—*Johnson v. McMillan*, 13 Colo. 423, 22 Pac. 769.

*Connecticut*.—*Andrews v. Morse*, 12 Conn. 444, 31 Am. Dec. 752.

*Iowa*.—*Fisher v. Oskaloosa*, 28 Ia. 381; *Brainard v. Elwood*, 53 Ia. 30, 3 N. W. 799; *Winslow v. Central*

lowed, notwithstanding the existence of an attorney's lien, if it appears that the client is financially responsible.<sup>5</sup> And where no lien rights exist in favor of the attorney, a litigant may discontinue or dismiss an action or proceeding without the consent of his counsel;<sup>6</sup> nor is there anything to prevent a litigant, acting fairly and honestly, from abandoning a suit, whether an attorney's lien has accrued with respect thereto or not.<sup>7</sup> Where a plaintiff, without the knowledge or consent of his attorney, settles the action collusively for the purpose of depriving the attorney of his fees, the latter may, by giving notice to the party sought to be charged of his intention to continue the cause in the name of his client for the recovery of his fees only, proceed with the suit for that

Iowa R. Co., 71 Ia. 197, 32 N. W. 330; Larned v. Dubuque, 86 Ia. 166, 53 N. W. 105.

Kentucky.—Stephens v. Farrar, 4 Bush 13.

Louisiana.—Safford v. Carroll, 23 La. Ann. 382.

Maine.—Bickford v. Ellis, 50 Me. 121; Newbert v. Cunningham, 59 Me. 231, 79 Am. Dec. 612; Cooley v. Paterson, 52 Me. 472; McKenzie v. Wardwell, 61 Me. 136.

Michigan.—Weeks v. Wayne Circuit Judges, 73 Mich. 256, 41 N. W. 269; Millard v. Jordan, 76 Mich. 131, 42 N. W. 1085.

New Jersey.—Barnes v. Taylor, 30 N. J. Eq. 467; Braden v. Ward, 42 N. J. L. 521.

New York.—Bailey v. Murphy, 136 N. Y. 50, 32 N. E. 627, affirming 51 Hun 643 mem., 4 N. Y. S. 579; Roberts v. Union El. R. Co., 84 Hun 437, 32 N. Y. S. 387.

South Dakota.—Leighton v. Servenson, 8 S. D. 350, 66 N. W. 938.

Tennessee.—Covington v. Bass, 88 Tenn. 496, 12 S. W. 1033.

Texas.—Marschall v. Smith, 132 S. W. 812.

Vermont.—Hutchinson v. Pettes, 18 Vt. 614; Hooper v. Welch, 43 Vt. 169, 5 Am. Rep. 267.

West Virginia.—Renick v. Ludington, 16 W. Va. 378. See also *supra*, §§ 634-637, as to lien rights against judgments and decrees.

<sup>5</sup> Mitchell v. Mitchell, 143 App. Div. 172, 127 N. Y. S. 1065; Witmark v. Perley, 43 Misc. 14, 86 N. Y. S. 756.

<sup>6</sup> Cameron v. Boeger, 102 Ill. App. 649, affirmed 200 Ill. 84, 65 N. E. 690, 93 Am. St. Rep. 165; Rowe v. Fogle, 88 Ky. 105, 10 S. W. 426, 2 L.R.A. 708, 10 Ky. L. Rep. 689; Sheedy v. McMurtry, 44 Neb. 499, 63 N. W. 21; Evans v. Muller, 74 App. Div. 630, 77 N. Y. S. 1027.

<sup>7</sup> De Wandelaer v. Sawdey, 78 Conn. 654, 63 Atl. 446; Matter of Evans' Will, 58 App. Div. 502, 16 N. Y. Ann. Cas. 32, 69 N. Y. S. 482, rehearing denied 65 App. Div. 610, 72 N. Y. S. 493; Sullivan v. McCann, 113 App. Div. 61, 37 Civ. Proc. 113, 98 N. Y. S. 947; Landreth v. Powell, 122 Tenn. 195, 121 S. W. 500; Foot v. Tewksbury, 2 Vt. 97.

purpose, and hence is not entitled to maintain a proceeding to enjoin the dismissal.<sup>8</sup>

§ 647. **Substitution.** — An attorney's right to a lien for services rendered cannot be defeated by substitution.<sup>9</sup> It is not doubted, of course, that the client may discharge his attorney at pleasure, and substitute another in his stead;<sup>10</sup> but, in allowing such substitution, it is customary to impose terms whereby the original attorney is protected in his compensation.<sup>11</sup> Where an attorney abandons the cause of his client without justification, he will be deemed to have lost his right to compensation,<sup>12</sup> and to a lien therefor;<sup>13</sup> and in those cases it would seem that substitution may be made without regard to the attorney's lien rights.<sup>14</sup>

§ 648. **Assignment of Judgment.** — An assignee of a judgment takes subject to an attorney's lien thereon, whether he has notice thereof or not.<sup>15</sup> The reason usually assigned for this rule

<sup>8</sup> *Jackson v. Stearns*, 48 Ore. 25, 84 Pac. 798, 5 L.R.A.(N.S.) 390.

<sup>9</sup> *United States*.—In re Paschal, 10 Wall. 496, 19 U. S. (L. ed.) 992; *Dodge v. Schell*, 12 Fed. 515, 14 Rep. 39, 10 Abb. N. Cas. (N. Y.) 465; *Ronald v. Mutual Reserve Fund Life Ass'n*, 30 Fed. 228.

*Alabama*.—*Kelly v. Horsely*, 147 Ala. 508, 41 So. 902.

*Iowa*.—*Gibson v. Chicago, M. & St. P. R. Co.*, 122 Ia. 565, 98 N. W. 474.

*New Jersey*.—*Hudson Trust & Savings Inst. v. Carr-Curran Paper Mills*, 44 Atl. 638.

*New York*.—*Creighton v. Ingersoll*, 20 Barb. 541; *Jeffards v. Brooklyn Heights R. Co.*, 49 App. Div. 45, 63 N. Y. S. 530; *Kunath v. Bremer*, 53 App. Div. 271, 65 N. Y. S. 830; *Bryant v. Brooklyn Heights R. Co.*, 64 App. Div. 542, 72 N. Y. S. 308; *Randel v. Vanderbilt*, 75 App. Div. 313, 78 N. Y. S. 124; *Kane v. Rose*, 87 App. Div. 101, 84 N. Y. S. 111,

*affirmed* 177 N. Y. 557, 69 N. E. 1125; *Johnson v. Ravitch*, 113 App. Div. 810, 99 N. Y. S. 1059; *Sciolaro v. Asch*, 137 App. Div. 667, 122 N. Y. S. 518, 137 App. Div. 946, 126 N. Y. S. 1151; *O'Sullivan v. Metropolitan St. R. Co.*, 39 Misc. 269, 79 N. Y. S. 481; *Fenlon v. Paillard*, 46 Misc. 151, 93 N. Y. S. 1101; *Lederer v. Goldston*, 63 Misc. 322, 117 N. Y. S. 151; *Schneible v. Travelers' Ins. Co.*, 32 Civ. Proc. 273, 73 N. Y. S. 955.

*Utah*.—*Sandberg v. Victor Gold & Silver Min. Co.*, 18 Utah 66, 55 Pac. 74.

<sup>10</sup> See *supra*, § 143.

<sup>11</sup> See *supra*, §§ 147, 148.

<sup>12</sup> See *supra*, § 453.

<sup>13</sup> See *supra*, § 610.

<sup>14</sup> *Hektograph Co. v. Fournal*, 11 Fed. 844.

<sup>15</sup> *Arkansas*.—*Sexton v. Pike*, 13 Ark. 193; *Porter v. Hanson*, 36 Ark. 591.

*Colorado*.—*Davidson v. La Plata*

is that an attorney has no practical means of knowing to whom a judgment may be assigned, and, therefore, it is but reasonable to require such an assignee to make the necessary inquiries before taking the assignment.<sup>16</sup> Thus, it has been held that a statutory provision to the effect that a judgment defendant shall have notice of a lien on the judgment where the record shows the name of the attorney therein, is for the benefit of the defendant alone; and the fact that the attorney's name does not appear of record affords no protection to an assignee of the judgment as against the attorney's lien thereon.<sup>17</sup> In some jurisdictions, however, compliance with certain statutory formalities is mandatory.<sup>18</sup>

§ 649. Assignment of Cause of Action. — Nor can a cause of action, or the subject-matter of litigation, be assigned so as to

County, 26 Colo. 549, 59 Pac. 46; Colorado State Bank *v.* Davidson, 7 Colo. App. 91, 42 Pac. 687.

*District of Columbia.*—Hutchinson *v.* Worthington, 7 App. Cas. 548.

*Georgia.*—Lovett *v.* Moore, 98 Ga. 158, 26 S. E. 498.

*Illinois.*—Hawk *v.* Ament, 28 Ill. App. 390.

*Indiana.*—Peterson *v.* Struby, 25 Ind. App. 19, 56 N. E. 733, rehearing denied 25 Ind. App. 25, 57 N. E. 599.

*Kentucky.*—Central Trust Co. *v.* Richmond, N. I. & B. R. Co., 105 Fed. 803, 45 C. C. A. 60 (construing Kentucky statute).

*Massachusetts.*—Bruce *v.* Anderson, 176 Mass. 161, 57 N. E. 354.

*Minnesota.*—Gill *v.* Truelsen, 39 Minn. 373, 40 N. W. 254; Wetherby *v.* Weaver, 51 Minn. 73, 52 N. W. 970.

*Nebraska.*—Yates *v.* Kinney, 33 Neb. 853, 51 N. W. 230; Taylor *v.* Stull, 79 Neb. 295, 112 N. W. 577.

*New York.*—Fairbanks *v.* Sargent, 104 N. Y. 168, 9 N. E. 870, 58 Am. Rep. 490, reversing 39 Hun 588; Giuliano *v.* Whitenack, 9 Misc. 562,

24 Civ. Proc. 55, 1 N. Y. Ann. Cas. 75, 30 N. Y. S. 415; Schriever *v.* Brooklyn Heights R. Co., 30 Misc. 145, 30 Civ. Proc. 67, 61 N. Y. S. 644, 890, modified 49 App. Div. 629 mem., 63 N. Y. S. 217; Marvin *v.* Marvin, 22 Civ. Proc. 274, 19 N. Y. S. 371.

*South Dakota.*—Leighton *v.* Servenson, 8 S. D. 350, 66 N. W. 938.

*Tennessee.*—Cunningham *v.* McGrady, 2 Baxt. 141; Taylor *v.* Badoux, 58 S. W. 919.

*Vermont.*—Weed Sewing Mach. Co. *v.* Boutelle, 56 Vt. 570, 48 Am. Rep. 821; Parker *v.* Parker, 71 Vt. 387, 45 Atl. 756.

*West Virginia.*—Bent *v.* Lipscomb, 45 W. Va. 183, 31 S. E. 907, 72 Am. St. Rep. 815.

<sup>16</sup> In *Heartt v. Chipman*, 2 Aikens (Vt.) 162.

<sup>17</sup> *Tyler v. Slemp*, 124 Ky. 209, 90 S. W. 1041.

<sup>18</sup> Colorado State Bank *v.* Davidson, 7 Colo. App. 91, 42 Pac. 687; Alderman *v.* Nelson, 111 Ind. 255, 12 N. E. 394. And see also *supra*, §§ 600-605, as to notice of lien generally.

defeat an attorney's lien thereon.<sup>19</sup> Nor will an attorney be precluded from asserting his lien rights by the fact that he knew of an assignment of the subject-matter of the litigation by his client pending suit, and also that the client had agreed to prosecute the action without cost to the assignee.<sup>20</sup> In some jurisdictions, however, no lien exists on the client's cause of action, and in others, while such a lien is recognized, it does not attach until judgment has been entered;<sup>1</sup> and, in those states, a bona fide assignment of a cause of action will prevent the acquisition of an attorney's lien.<sup>2</sup>

### *Set-off.*

§ 650. **Generally.** — Set-off, excepting in so far as it was recognized in courts of equity, exists only by virtue of statutory authority; and, for this reason, it is practically impossible to state any rule of general application in relation thereto. Even in the same jurisdiction statutes are frequently changed, and it is necessary to examine the local law with reference to the particular case under consideration, in order that a satisfactory solution may be arrived at. It has been held in some jurisdictions that an attorney's lien on a judgment is subordinate to the right of set-off in the adverse party;<sup>3</sup> and in others, the contrary rule pre-

<sup>19</sup> *United States*.—*Key v. U. S. Bank*, 1 Hayw. & H. 74, 14 Fed. Cas. No. 7,746; *Frink v. McComb*, 60 Fed. 486.

*Nebraska*.—*Maloney v. Douglas County*, 2 Neb. (unofficial) Rep. 396, 89 N. W. 248.

*New York*.—*Ward v. Lee*, 13 Wend. 41; *Sweet v. Bartlett*, 4 Sandf. 661; *Boyle v. Boyle*, 106 N. Y. 654, 12 N. E. 709; *Old Colony Realty Co. v. Aitken*, 123 App. Div. 404, 107 N. Y. S. 1063.

*Vermont*.—*Heartt v. Chipman*, 2 Aikens 162.

<sup>20</sup> *Niagara Fire Ins. Co. v. Hart*, 13 Wash. 651, 43 Pac. 937.

<sup>1</sup> See *supra*, §§ 613-617.

<sup>2</sup> *La Framboise v. Grow*, 56 Ill. 197; *Potter v. Mayo*, 3 Greenl. (Me.) 34, 14 Am. Dec. 211.

<sup>3</sup> *United States*.—*National Bank of Winterset v. Eyre*, 8 Fed. 733, 3 McCrary 175.

*Alabama*.—Ex p. *Lehman*, 59 Ala. 631; *Mosely v. Norman*, 74 Ala. 422.

*Connecticut*.—*Benjamin v. Benjamin*, 17 Conn. 110.

*Kentucky*.—*Robertson v. Shutt*, 9 Bush 659; *Bradford v. Ware's Ex'r*, 12 Ky. L. Rep. 986 (abstract). Compare *Brown v. Lapp*, 89 S. W. 304, 28 Ky. L. Rep. 409.

*Maryland*.—*Marshall v. Cooper*, 43 Md. 46; *Levy v. Steinbach*, 43 Md. 212.

vails.<sup>4</sup> It seems to be conceded that a right of set-off in the adverse party, acquired subsequently to the acquisition of the attorney's lien, is subordinate to such lien.<sup>5</sup>

The foregoing statements have reference only to charging liens.<sup>6</sup> No right of set-off exists as to retaining liens.<sup>7</sup>

### § 651. Set-off of One Judgment against Another.—

Where, in the same litigation, judgments have been entered in favor of both parties, for costs or otherwise, one of such judgments may be set off against the other without reference to the attorney's lien for compensation, because such lien attaches only to the clear balance due the client after all equities have been

*Minnesota*.—*Lundberg v. Davidson*, 68 Minn. 328, 71 N. W. 395, 72 N. W. 71.

*New York*.—*De Figanieri v. Young*, 2 Robt. 670; *Perry v. Chester*, 36 Super. Ct. 228; *Brooks v. Hanford*, 15 Abb. Pr. 342; *Bowling Green Sav. Bank v. Todd*, 64 Barb. 146; *Sanders v. Gillett*, 8 Daly 183; *Ferguson v. Bassett*, 4 How. Pr. 168; *Noxon v. Gregory*, 5 How. Pr. 339; *Turno v. Parks*, 2 How. Pr. N. S. 35; *Mohawk Bank v. Burrows*, 6 Johns. Ch. 317; *Dunkin v. Vanderbergh*, 1 Paige 622; *Firmenich v. Bovee*, 4 Thomp. & C. 98; *Nicoll v. Nicoll*, 16 Wend. 446, *overruling* 2 Edw. 574. *Compare Davidson v. Alfaro*, 16 Hun 353; *Barry v. Third Ave. R. Co.*, 87 App. Div. 543, 84 N. Y. S. 830; *Bamberger v. Oshinsky*, 21 Misc. 716, 48 N. Y. S. 139; *Ennis v. Curry*, 61 How. Pr. 1.

*Vermont*.—*McDonald v. Smith*, 57 Vt. 502.

*Wisconsin*.—*Bosworth v. Tallman*, 66 Wis. 533, 29 N. W. 542.

<sup>4</sup> *California*.—See *Hathaway v. Paterson*, 45 Cal. 294.

*Florida*.—*Carter v. Bennett*, 6 Fla. 214; *Carter v. Davis*, 8 Fla. 183.

*Massachusetts*.—*Rider v. Ocean Ins. Co.*, 20 Pick. 259; *Little v. Rodgers*, 2 Mete. 478.

*Nebraska*.—*Boyer v. Clark*, 3 Neb. 161; *Finney v. Gallop*, 2 Neb. (unofficial) Rep. 480, 89 N. W. 276; *Rice v. Day*, 33 Neb. 204, 49 N. W. 1128. *Compare Field v. Maxwell*, 44 Neb. 900, 63 N. W. 62.

*South Dakota*.—*Hroch v. Aultman & Taylor Co.*, 3 S. D. 477, 54 N. W. 269.

<sup>5</sup> *Warfield v. Campbell*, 38 Ala. 527, 82 Am. Dec. 724; *Caudle v. Rice*, 78 Ga. 81, 3 S. E. 7; *Puett v. Beard*, 86 Ind. 172, 44 Am. Rep. 280; *Bradt v. Koon*, 4 Cow. (N. Y.) 416.

<sup>6</sup> See *supra*, § 578, for a definition of the charging lien.

<sup>7</sup> *Bamberger v. Oshinsky*, 21 Misc. 716, 48 N. Y. S. 139; *Goodrich v. Mott*, 9 Vt. 395. And see also *supra*, § 573, for a definition of the retaining lien.

settled.<sup>8</sup> As a general rule, however, the taxable costs due the attorney will be protected.<sup>9</sup>

On the other hand, where judgments exist in favor of both parties in different actions, the attorney's lien in either case is superior to the defendant's right of set-off;<sup>10</sup> and this is especially true as to the attorney's lien for his taxable costs.<sup>11</sup> In some juris-

<sup>8</sup> *Iowa*.—*Watson v. Smith*, 63 Ia. 228, 18 N. W. 916, following *Tiffany v. Stewart*, 60 Ia. 207, 14 N. W. 241. Compare *Ward v. Sherbondy*, 96 Ia. 477, 65 N. W. 413.

*Massachusetts*.—*Little v. Rodgers*, 2 Metc. 478.

*Missouri*.—*State v. U. S. Fidelity & Guaranty Co.*, 135 Mo. App. 160, 115 S. W. 1081.

*New York*.—*Smith v. Chenoweth*, 14 Daly 166, 6 N. Y. St. Rep. 232; *Porter v. Lane*, 8 Johns. 357; *Channing v. Moore*, 11 N. Y. St. Rep. 670. Compare *Hovey v. Rubber Tip Pencil Co.*, 14 Abb. Pr. N. S. 66.

*South Dakota*.—*Lindsay v. Pettigrew*, 8 S. D. 244, 66 N. W. 321; *Garrigan v. Huntimer*, 21 S. D. 269, 111 N. W. 563.

*Wisconsin*.—*Bosworth v. Tallman*, 66 Wis. 533, 29 N. W. 542.

<sup>9</sup> *Indiana*.—*Johnson v. Ballard*, 44 Ind. 270.

*Michigan*.—*Kinney v. Tabor*, 62 Mich. 517, 29 N. W. 86, 512.

*New Hampshire*.—*Shapley v. Belows*, 4 N. H. 347; *Rowe v. Langley*, 49 N. H. 395.

*New York*.—*Devoy v. Boyer*, 3 Johns. 247; *Ennis v. Curry*, 22 Hun 584; *Smith v. Cayuga Lake Cement Co.*, 107 App. Div. 524, 95 N. Y. S. 236; *Place v. Hayward*, 8 Civ. Proc. 352; *Smith v. Chenoweth*, 11 Civ. Proc. 138, 3 N. Y. St. Rep. 265.

<sup>10</sup> *Illinois*.—*Brent v. Brent*, 24 Ill. App. 448.

*Indiana*.—*Adams v. Lee*, 82 Ind. 587; *Harshman v. Armstrong*, 119 Ind. 224, 21 N. E. 662.

*Kansas*.—*Leavenson v. Lafontaine*, 3 Kan. 523.

*Maine*.—*Stone v. Hyde*, 22 Me. 318; *Hooper v. Brundage*, 22 Me. 460; *Howe v. Klein*, 89 Me. 376, 36 Atl. 620.

*Minnesota*.—*Lindholm v. Itasca Lumber Co.*, 64 Minn. 46, 65 N. W. 931. Compare *Morton v. Urquhart*, 79 Minn. 390, 82 N. W. 653.

*Nebraska*.—*Ward v. Watson*, 27 Neb. 768, 44 N. W. 27.

*New Jersey*.—*Terney v. Wilson*, 45 N. J. L. 282.

*New York*.—*Wesley v. Wood*, 73 Misc. 33, 132 N. Y. S. 248.

*Ohio*.—*Diehl v. Friester*, 37 Ohio St. 473.

*South Dakota*.—*Mosteller v. Holborn*, 21 S. D. 547, 114 N. W. 693. See also *Pirie v. Harkness*, 3 S. D. 178, 52 N. W. 581.

*Tennessee*.—*Roberts v. Mitchell*, 94 Tenn. 277, 29 S. W. 5, 29 L.R.A. 705.

<sup>11</sup> *Maine*.—*Peirce v. Bent*, 69 Me. 381; *Harrington v. Bean*, 94 Me. 208, 47 Atl. 147; *Collins v. Campbell*, 97 Me. 23, 53 Atl. 837, 94 Am. St. Rep. 458.

*Minnesota*.—*Lundberg v. Davidson*, 68 Minn. 328, 71 N. W. 395, 72 N. W. 71.

dictions, however, the right to set off one judgment against another, even though they have been rendered in different proceedings, is superior to the attorney's lien.<sup>12</sup>

The right of set-off generally depends entirely on statute, and it is essential that the local laws should be consulted.

**§ 652. Assignment of Judgment to Counsel as Affecting Right of Set-off.**—The assignment of a judgment, or any part thereof, to the attorney in payment for his services will be effective as against any right of set-off in the adverse party which did not exist at the time of the assignment;<sup>13</sup> but such assignment will

*New Jersey.*—*Brown v. Hendrickson*, 39 N. J. L. 239; *Phillips v. Mackay*, 54 N. J. L. 319, 23 Atl. 941; *Pride v. Smalley*, 66 N. J. L. 578, 52 Atl. 955.

*New York.*—*Kaufman v. Keenan*, 13 Civ. Proc. 225; *Ainslie v. Boynton*, 2 Barb. 258; *Cole v. Grant*, 2 Caines 105; *Nicoll v. Nicoll*, 2 Edw. 574; *Devoy v. Bowyer*, 3 Johns. 247; *Dunkin v. Vandenberg*, 1 Paige 622; *Jaeger v. Koenig*, 33 Misc. 82, 67 N. Y. S. 172, *reversing* 32 Misc. 244, 65 N. Y. S. 795.

<sup>12</sup> *Georgia.*—*Langston v. Roby*, 68 Ga. 406; *Smith v. Evans*, 110 Ga. 536, 35 S. E. 633. *Compare* *Candle v. Rice*, 78 Ga. 81, 3 S. E. 7.

*Iowa.*—*Hurst v. Sheets*, 21 Ia. 501; *Tiffany v. Stewart*, 60 Ia. 207, 14 N. W. 241.

*New Hampshire.*—*Holt v. Quimby*, 6 N. H. 79.

*New York.*—*Hayden v. McDermott*, 9 Abb. Pr. 14; *Cragin v. Travis*, 1 How. Pr. 157; *Ferguson v. Bassett*, 4 How. Pr. 168; *Noxon v. Gregory*, 5 How. Pr. 339; *Martin v. Kanouse*, 17 How. Pr. 146; *Firmenich v. Boyce*, 4 Thomp. & C. 98; *Dunkin v. Vandenberg*, 1 Paige 622. *Compare* *Perry v.*

*Chester*, 53 N. Y. 240; *Webb v. Parker*, 130 App. Div. 92, 114 N. Y. S. 489; *Gridley v. Garrison*, 4 Paige 647.

*Vermont.*—*Fairbanks v. Devereaux*, 58 Vt. 359, 3 Atl. 500.

<sup>13</sup> *United States.*—*L. Bucki & Son Lumber Co. v. Atlantic Lumber Co.*, 128 Fed. 332, 63 C. C. A. 62.

*Connecticut.*—*Benjamin v. Benjamin*, 17 Conn. 110; *Ripley v. Bull*, 19 Conn. 53.

*Michigan.*—*Wells v. Elsam*, 40 Mich. 218.

*New York.*—*Roberts v. Carter*, 9 Abb. Pr. 366 note; *Peckham v. Barcalow*, Hill & D. 112; *Ely v. Cook*, 2 Hilt. 406, 9 Abb. Pr. 366; *Roberts v. Carter*, 17 How. Pr. 341; *Naylor v. Lane*, 50 Super. Ct. 97; *Firmenich v. Boyce*, 1 Hun 532, 4 Thomp. & C. 98; *Delaney v. Miller*, 84 Hun 244, 1 N. Y. Ann. Cas. 266, 32 N. Y. S. 505, *affirming* 78 Hun 18, 28 N. Y. S. 1059; *Palmer v. Palmer*, 24 Misc. 217, 53 N. Y. S. 538; *Hayes v. Carr*, 12 N. Y. St. Rep. 584.

*Oregon.*—*Ladd v. Ferguson*, 9 Ore. 180.

*Wisconsin.*—*Rice v. Garnhart*, 35 Wis. 282; *Stanley v. Bouck*, 107 Wis. 225, 83 N. W. 298.



be subordinate to a right of set-off which existed at the time the assignment was made.<sup>14</sup> An attorney to whom a judgment, or part thereof, has been assigned, may set off the same as against a judgment owned by the defendant against the attorney.<sup>15</sup>

<sup>14</sup> *United States*.—Fitzhugh v. McKinney, 43 Fed. 461.

*Kansas*.—Turner v. Crawford, 14 Kan. 499.

*Maryland*.—Marshall v. Cooper, 43 Md. 46.

*New York*.—Pulver v. Harris, 52 N. Y. 73; Fromme v. Gray, 17 Misc. 77, 39 N. Y. S. 856; Ferguson v. Bassett, 4 How. Pr. 168.

*North Dakota*.—Clark v. Sullivan, 3 N. D. 280, 55 N. W. 733.

*Pennsylvania*.—In re Aber, 18 Pa. Super. Ct. 110; Johnson v. Hopkins, 1 Chest. Co. Rep. 68; Reardon v. Peirce, 1 Chest. Co. Rep. 71.

<sup>15</sup> *People v. New York Common Pleas*, 13 Wend. (N. Y.) 649, 28 Am. Dec. 495.

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## CHAPTER XXVI.

### ENFORCEMENT OF LIENS.

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*In General.*

§ 653. **Right to Enforce Lien.** — As a general rule, statutes which create attorneys' liens also provide for their enforcement; and in those states where lien rights exist only by virtue of statutory authority, a like authority must exist for their enforcement.<sup>1</sup> In many jurisdictions, however, it is recognized that attorneys' charging liens may accrue, and may also be enforced, irrespective of such authority;<sup>2</sup> indeed, to declare an attorney entitled to a lien, and, at the same time, to declare that he cannot enforce it, would be bestowing upon him the shadow and withholding the substance.<sup>3</sup> But it may be possible that an attorney will be called upon to bear at least some of the expense connected with the enforcement of his lien; thus, it has been held that an attorney must contribute ratably to the expense necessary for the enforcement of a judgment upon which he has a lien, and take his percentage out of the net amount realized.<sup>4</sup>

§ 654. **Courts Wherein Enforcement May Be Had.** — As a general rule, a lien must be enforced in the court wherein

<sup>1</sup> *Plummer v. Great Northern R. Co.*, 60 Wash. 214, 110 Pac. 989. 31 L.R.A.(N.S.) 1215.

<sup>3</sup> *Fillmore v. Wells*, 10 Colo. 228, 15 Pac. 343, 3 Am. St. Rep. 567.

<sup>2</sup> See *supra*, §§ 578-582, as to charging liens generally. And see also *Mathot v. Triebel*, 98 App. Div. 328, 90 N. Y. S. 903.

<sup>4</sup> *Fisher v. Mylius*, 62 W. Va. 19, 57 S. E. 276.

the services for which the lien accrued were rendered,<sup>5</sup> even though some of the parties may reside in another jurisdiction.<sup>6</sup> This rule also applies to federal courts;<sup>7</sup> but the removal of an action from a state to the federal court does not prevent the state court from enforcing an attorney's lien which attached upon the commencement of the action.<sup>8</sup> So, in some jurisdictions an attorney's lien may be recognized and enforced in a surrogate's court,<sup>9</sup> and this has been held to be true even though the services for which the lien accrued were rendered in another court.<sup>10</sup> Appellate courts also afford relief, in some states, in the enforcement of attorney's liens.<sup>11</sup> But in some jurisdictions wherein an attorney's lien is allowed for services rendered in certain inferior courts, it has been held that such lien can only be enforced in a court of record.<sup>12</sup> So, it has been held that a lien accruing for services rendered to certain members of an Indian tribe, in proceedings before the

<sup>5</sup> *England*.—*Read v. Dupper*, 6 T. R. 361.

*United States*.—*Central R. & B. Co. v. Pettus*, 113 U. S. 116, 5 S. Ct. 387, 28 U. S. (L. ed.) 915; *Tuttle v. Claflin*, 86 Fed. 964.

*Arkansas*.—*Gist v. Hanly*, 33 Ark. 233.

*Colorado*.—*Fillmore v. Wells*, 10 Colo. 228, 15 Pac. 343, 3 Am. St. Rep. 567.

*Michigan*.—*Wipfler v. Warren*, 163 Mich. 189, 128 N. W. 178, 17 Detroit Leg. N. 905.

*New York*.—*Brown v. Comstock*, 10 Barb. 67, 3 Code Rep. 142; *Adams v. Fox*, 40 Barb. 442; *In re King*, 168 N. Y. 53, 60 N. E. 1054, *modifying* 61 App. Div. 152, 70 N. Y. S. 356.

<sup>6</sup> *In re King*, 168 N. Y. 53, 60 N. E. 1054, *modifying* 61 App. Div. 152, 70 N. Y. S. 356; *Oishei v. Pennsylvania R. Co.*, 117 App. Div. 110, 117, 118, 119, 102 N. Y. S. 368, 373, 374.

<sup>7</sup> *Ingersoll v. Coram*, 211 U. S. 335, 29 S. Ct. 92, 53 U. S. (L. ed.) 208.

See also § 8 of the Act of Mar. 3, 1875 (4 Fed. St. Ann. p. 380).

<sup>8</sup> *Oishei v. Pennsylvania R. Co.*, 117 App. Div. 110, 117, 118, 119, 102 N. Y. S. 368, 373, 374.

<sup>9</sup> *In re Rowland*, 55 App. Div. 66, 8 N. Y. Ann. Cas. 397, 66 N. Y. S. 1121, *affirmed* 166 N. Y. 641, 60 N. E. 1120; *In re Regan*, 29 Misc. 527, 7 N. Y. Ann. Cas. 165, 61 N. Y. S. 1074. See also *Robinson's Estate*, 59 Misc. 323, 112 N. Y. S. 280. *Compare In re Pieris*, 82 App. Div. 466, 81 N. Y. S. 927, *affirmed* 176 N. Y. 566, 68 N. E. 1123.

<sup>10</sup> *Close v. Shute*, 4 Dem. (N. Y.) 546. *Compare In re Pieris*, 82 App. Div. 466, 81 N. Y. S. 927.

<sup>11</sup> See *infra*, § 671.

<sup>12</sup> Thus, a lien accrues for services rendered in a municipal court of the city of New York, but it seems that it must be enforced in the supreme court. *People v. Fitzpatrick*, 35 Misc. 456, 71 N. Y. S. 191; *Tynan v. Mart*, 53 Misc. 49, 103 N. Y. S. 1033.

secretary of the interior, cannot be enforced in a mandamus proceeding to compel the secretary to restore the names of such Indians to the tribal roll.<sup>13</sup> A statute allowing enforcement in any court of competent jurisdiction is valid.<sup>14</sup>

**§ 655. Law Which Governs.** — The lien of an attorney will be enforced according to the law of the state where the lien attached, and not according to the law of a state wherein the judgment is sought to be collected.<sup>15</sup> And where services were rendered to a foreign trustee, who sought to remove funds from the control of the courts in one state and bring them to another, it was held that the courts of the state wherein the services were rendered, and the funds located, had power to determine the amount for which an attorney's lien should be established.<sup>16</sup>

*By and Against Whom Enforcement May Be Effected.*

**§ 656. Who May Enforce Lien.** — An attorney's lien may be enforced by himself,<sup>17</sup> or by his assignee.<sup>18</sup> So, an attorney's lien, declared in favor of a law partnership, may be enforced by one of the firm who became the owner thereof by virtue of an

<sup>13</sup> *Kappler v. Sumpter*, 33 App. Cas. (D. C.) 404, wherein it was said that all contracts with Indians are subject to the supervision and allowance of the secretary of the interior. "All of the attorneys will probably have to go before him for a final approval and settlement of their contracts and claims for fees. And there is nothing in the orders complained of that would preclude inquiry by him into the several contracts of the attorneys, and the allowance of the same as may appear fair and just, to the full extent of the discretion committed to him by Congress in such matters. But, if the secretary have no such discretionary power under the law, the parties will

not be deprived of their remedies in the courts having jurisdiction in the premises."

<sup>14</sup> *Burns v. Illinois Cent. R. Co.*, 258 Ill. 302, 101 N. E. 551.

<sup>15</sup> *Citizens' Nat. Bank v. Culver*, 54 N. H. 327, 20 Am. Rep. 134.

<sup>16</sup> *In re King*, 168 N. Y. 53, 60 N. E. 1054, *modifying* 61 App. Div. 152, 70 N. Y. S. 356.

<sup>17</sup> *In re Wilson*, 12 Fed. 235, 26 Alb. L. J. 271; *Adams v. Fox*, 40 Barb. (N. Y.) 442; *Kipp v. Rapp*, 2 How. Pr. N. S. (N. Y.) 169, 7 Civ. Proc. 385.

<sup>18</sup> *Fisher v. Mylius*, 62 W. Va. 19, 57 S. E. 276.

As to the assignability of a lien, see *supra*, § 611.

arrangement with the other partner.<sup>19</sup> But where a law firm has been dissolved under an agreement whereby its business was to be wound up by one of its members, the other member has no interest in such business which will warrant him in asserting an attorney's lien with respect thereto.<sup>20</sup> Proceedings for the enforcement of an attorney's lien cannot be maintained by the parties to the litigation.<sup>1</sup> Nor can one who has not been admitted to practice as an attorney be joined with a licensed practitioner in an action for the enforcement of an attorney's lien for services performed by both of them;<sup>2</sup> but it seems that an attorney duly admitted in another state may be a party to the enforcement of an attorney's lien in a state wherein he has rendered professional services, although he has not been admitted therein.<sup>3</sup>

### § 657. Against Whom Enforcement May Be Had.—

An attorney's charging lien may be enforced against the client,<sup>4</sup> or his assignee.<sup>5</sup> So, the lien may be enforced against an associate attorney,<sup>6</sup> or against the defendant,<sup>7</sup> and in some instances enforcement may be had against the defendant's sureties;<sup>8</sup> and where the defendant and an assignee of the plaintiff are both liable, the attorney may elect as to whether he shall pursue one or both of them.<sup>9</sup> In some jurisdictions an attorney's lien may be

<sup>19</sup> *Vinson v. Cantrell*, (Tenn.) 56 S. W. 1034.

<sup>20</sup> *Schiefer v. Freygong*, 141 App. Div. 236, 125 N. Y. S. 1037. And see *supra*, § 472.

<sup>1</sup> *Avery v. Avery*, 5 Misc. 75, 23 Civ. Proc. 204, 24 N. Y. S. 737. See also *Jackson v. American Cigar Box Co.*, 141 App. Div. 195, 126 N. Y. S. 58.

<sup>2</sup> *Hittson v. Browne*, 3 Colo. 204.

<sup>3</sup> *Taylor v. Badoux*, (Tenn.) 58 S. W. 919.

<sup>4</sup> *Davidson v. La Plata County*, 26 Colo. 549, 59 Pac. 46. See *infra*, § 663.

<sup>5</sup> *Sexton v. Pike*, 13 Ark. 193; *Davidson v. La Plata County*, 26 Colo. 549, 59 Pac. 46; *Ross v. Bayer-*

*Gardner-Himes Co.*, 123 App. Div. 404, 107 N. Y. S. 1063; *Heartt v. Chipman*, 2 Aikens (Vt.) 162.

Assignment by client as affecting lien, see *supra*, §§ 648, 649.

<sup>6</sup> *Smith v. Goode*, 29 Ga. 185. See also *Elliott v. Leopard Min. Co.*, 52 Cal. 355.

<sup>7</sup> *Proctor Coal Co. v. Tye*, 123 Ky. 381, 96 S. W. 512; *Oishei v. Metropolitan St. R. Co.*, 110 App. Div. 709, 35 Civ. Proc. 240, 97 N. Y. S. 447; *Ingersoll v. Coal Creek Coal Co.*, 117 Tenn. 263, 10 Ann. Cas. 829, 98 S. W. 178, 9 L.R.A. (N.S.) 282.

<sup>8</sup> See *infra*, § 678.

<sup>9</sup> *Davidson v. La Plata County*, 26 Colo. 549, 59 Pac. 46.

enforced against any one into whose hands the proceeds of litigation, in connection with which the lien accrued, may come.<sup>10</sup> In order that enforcement may be effective, however, it must be shown that a lien has actually accrued to the attorney, and that a sum of money is due him thereon<sup>11</sup> for professional services which he was authorized to render;<sup>12</sup> and in some jurisdictions it is essential, in order that the lien may be enforced against the defendant, that the attorney should be unable to enforce his claim against his client.<sup>13</sup>

*Vacation of Proceedings to Effect Settlement.*

§ 658. Vacation of Settlement Proceedings Generally. —

In many jurisdictions an attorney may move to vacate such action as has been taken by his client, or by the adverse party, or both, for the purpose of effecting a disposition of the litigation wherein the attorney has been engaged and has acquired a lien, in so far as the same may affect his lien rights. This procedure is authorized by statute in some instances; but even in the absence of statute, the court undoubtedly has inherent power to protect its officers in this respect.<sup>14</sup> Thus, an attorney may move to set aside the satisfaction of a judgment,<sup>15</sup> or to vacate the cancellation of an under-

<sup>10</sup> Mo. Rev. St. (1909) § 964; New York Judiciary Law, § 475; Utah Comp. Laws, § 135.

<sup>11</sup> See *infra*, § 671.

<sup>12</sup> See *infra*, § 680.

<sup>13</sup> See *infra*, § 680.

<sup>14</sup> *Potter v. Ajax Min. Co.*, 19 Utah 421, 57 Pac. 270.

<sup>15</sup> *United States*.—*Patrick v. Leach*, 17 Fed. 476, 3 McCrary 555.

*Minnesota*.—*Northrup v. Hayward*, 102 Minn. 307, 12 Ann. Cas. 341, 113 N. W. 701.

*Missouri*.—*Young v. Renshaw*, 102 Mo. App. 173, 76 S. W. 701; *Stephens v. Metropolitan St. R. Co.*, 157 Mo. App. 656, 138 S. W. 904; *Smoot v. Shy*, 159 Mo. App. 126, 139 S. W. 239.

*New York*.—*Spors v. Schultheis*, 55 Hun 603 mem., 8 N. Y. S. 175; *Roberts v. Union El. R. Co.*, 84 Hun 437, 32 N. Y. S. 387; *Baxter v. Connor*, 119 App. Div. 450, 104 N. Y. S. 227; *Knickerbocker Inv. Co. v. Voorhees*, 128 App. Div. 639, 112 N. Y. S. 842; *Guliano v. Whitenack*, 9 Misc. 562, 24 Civ. Proc. 55, 1 N. Y. Ann. Cas. 75, 30 N. Y. S. 415; *Mitchell v. Piqua Club Ass'n*, 15 Misc. 366, 25 Civ. Proc. 139, 37 N. Y. S. 406; *Bollar v. Schoenwirt*, 30 Misc. 224, 63 N. Y. S. 311; *Whittaker v. New York & Harlem R. Co.*, 54 Super. Ct. 8, 18 Abb. N. Cas. 11, 11 Civ. Proc. 189, 3 N. Y. St. Rep. 537; *Commercial Tel. Co. v. Smith*, 19 Civ. Proc. 32, 10 N. Y. S. 433.

taking against which his lien might be enforced;<sup>16</sup> so, he may move to set aside a settlement,<sup>17</sup> or a dismissal of the litigation.<sup>18</sup> A proceeding of this character, however, can be instituted only by the lien claimant;<sup>19</sup> and it seems that the client is not a necessary party.<sup>20</sup>

### § 659. Seeking Additional Relief in Vacation Proceedings.

—It is evident that the mere vacation of proceedings for the purpose of effecting a settlement will not, of itself, afford relief in all instances, and, therefore, it is usual to accompany the application for vacation with a request that the cause be restored,<sup>1</sup> and the attorney permitted to continue the litigation to final judgment for the purpose of establishing his lien.<sup>2</sup> And in some jurisdictions the amount due an attorney may be determined, and his lien therefor enforced, in the vacation proceedings,<sup>3</sup> or the attorney may be permitted to issue an execution to the extent of his lien.<sup>4</sup> The court will not, however, undertake, upon affidavits, to try either a charge made by the plaintiff's attorneys of collusion between the plaintiff and the defendant in the settlement, or the charge made by the defendant's attorney of champertous conduct

*Utah*.—Potter *v.* Ajax Min. Co., 19 Utah 421, 57 Pac. 270.

<sup>16</sup> Knickerbocker Inv. Co. *v.* Voorhees, 128 App. Div. 639, 112 N. Y. S. 842. And see *infra*, § 660.

<sup>17</sup> *Minnesota*.—Desaman *v.* Butler, 114 Minn. 362, 131 N. W. 463.

*Missouri*.—Wait *v.* Atchison, T. & S. F. R. Co., 204 Mo. 491, 103 S. W. 60.

*Nebraska*.—Aspinwall *v.* Sabin, 22 Neb. 73, 34 N. W. 72, 3 Am. St. Rep. 258; Jones *v.* Duff Grain Co., 69 Neb. 191, 95 N. W. 1.

*New York*.—Kuehn *v.* Syracuse Rapid Transit R. Co., 183 N. Y. 456, 76 N. E. 589, reversing 104 App. Div. 580, 93 N. Y. S. 883.

*Wisconsin*.—Howard *v.* Osceola, 22 Wis. 453.

<sup>18</sup> Zentmire *v.* Brailey, 89 Neb. 158,

130 N. W. 1047; Jackson *v.* Stearns, 48 Ore. 25, 84 Pac. 798, 5 L.R.A. (N.S.) 390.

<sup>19</sup> Murray *v.* Jibson, 22 Hun (N. Y.) 386. And see *supra*, § 656.

<sup>20</sup> Aspinwall *v.* Sabin, 22 Neb. 73, 34 N. W. 72, 3 Am. St. Rep. 258. And see also *infra*, § 664.

<sup>1</sup> Platt *v.* Jerome, 19 How. 384, 15 U. S. (L. ed.) 623; Desaman *v.* Butler, 114 Minn. 362, 131 N. W. 463.

<sup>2</sup> See *infra*, § 673.

<sup>3</sup> Stephens *v.* Metropolitan St. R. Co., 157 Mo. App. 656, 138 S. W. 904; Smoot *v.* Shy, 159 Mo. App. 126, 139 S. W. 239. See also Guliano *v.* Whiteneck, 9 Misc. 562, 24 Civ. Proc. 55, 1 N. Y. Ann. Cas. 75, 30 N. Y. S. 415.

<sup>4</sup> Smoot *v.* Shy, 159 Mo. App. 126, 139 S. W. 239. See *infra*, § 668.



on the part of the attorney securing the contract of employment from the plaintiff.<sup>5</sup>

**§ 660. When Proceedings Will Be Vacated.** — As a general rule, the law encourages the settlement of litigation, and, therefore, the fair and honest disposition of a cause by the client will rarely be interfered with.<sup>6</sup> The circumstances must be such as will warrant interference by the court in order to enable the attorney to recover his compensation,<sup>7</sup> and the attorney must act promptly; laches may be fatal.<sup>8</sup> The mere fact that the client has been overreached is not sufficient ground for setting aside a settlement made by him with the adverse party.<sup>9</sup> But it is quite generally recognized that proceedings by which a settlement has been effected, will be vacated where it appears that such settlement was entered into with the intention of defrauding the attorney in the matter of his compensation,<sup>10</sup> or where the client is an irresponsible person.<sup>11</sup> In some instances it would seem that the fact of a settlement having been made with knowledge, or means of knowledge, of the existence of an attorney's lien, will warrant the court in vacating the proceedings;<sup>12</sup> and it has

<sup>5</sup> *Kern v. Chicago, M. & P. S. R. Co.*, 201 Fed. 404.

<sup>6</sup> See *supra*, §§ 640-646. See also *Murray v. Jibson*, 22 Hun (N. Y.) 386; *Zimmer v. Metropolitan St. R. Co.*, 32 Misc. 262, 65 N. Y. S. 977; *Jackson v. Stearns*, 48 Ore. 25, 84 Pac. 798, 5 L.R.A.(N.S.) 390.

<sup>7</sup> *Dahlstrom v. Featherstone*, 18 Idaho 179, 110 Pac. 243; *Poole v. Belcha*, 131 N. Y. 200, 30 N. E. 53; *Corbitt v. Watson*, 88 App. Div. 467, 85 N. Y. S. 125; *Courtney v. McGavock*, 23 Wis. 619.

<sup>8</sup> *Richardson v. Brooklyn City & N. R. Co.*, 7 Hun (N. Y.) 69; *Neill v. Van Wagenen*, 54 Super. Ct. (N. Y.) 477.

<sup>9</sup> *Stephens v. Metropolitan St. R. Co.*, 157 Mo. App. 656, 138 S. W. 904.

<sup>10</sup> *Jones v. Duff Grain Co.*, 69 Neb. 91, 95 N. W. 1; *Whittaker v. New York & Harlem R. Co.*, 18 Abb. N. Cas. 11, 11 Civ. Proc. 189, 54 Super. Ct. 8, 3 N. Y. St. Rep. 537; *Jackson v. Stearns*, 48 Ore. 25, 84 Pac. 798, 5 L.R.A.(N.S.) 390; *Howard v. Osceola*, 22 Wis. 453. And see also *supra*, § 642.

<sup>11</sup> *Baxter v. Connor*, 119 App. Div. 450, 104 N. Y. S. 327; *Mitchell v. Piqua Club Ass'n*, 15 Misc. 366, 25 Civ. Proc. 139, 37 N. Y. S. 406; *Bollar v. Schoenwirt*, 30 Misc. 224, 63 N. Y. S. 311.

<sup>12</sup> *Desaman v. Butler*, 114 Minn. 362, 131 N. W. 463; *Stephens v. Metropolitan St. R. Co.*, 157 Mo. App. 656, 138 S. W. 904.

been distinctly held that the attorney need not show any actual fraud.<sup>13</sup>

*Summary Determination and Enforcement of Lien in Original Action.*

§ 661. **Generally.**—In several jurisdictions an attorney may have his charging lien determined and enforced in the original action either by intervening therein as a party, or, without becoming a party, by presenting a petition to the court and praying for the determination and enforcement of his lien; this practice is usually authorized by statutes<sup>14</sup> which also provide that the lien may be determined and enforced by the court.<sup>15</sup> Thus, under the Georgia statute it has been held that it is the duty of the court to protect and enforce an attorney's lien, on application, where the circumstances warrant such action.<sup>16</sup> And under the New York statute<sup>17</sup> the court is obliged to determine and enforce an attorney's charging lien on the presentation of a petition setting forth sufficient grounds therefor.<sup>18</sup> But, in the absence of fraud,

<sup>13</sup> *Desaman v. Butler*, 114 Minn. 362, 131 N. W. 463; *Whittaker v. New York & Harlem R. Co.*, 18 Abb. N. Cas. 11, 11 Civ. Proc. 189, 54 Super. Ct. 8, 3 N. Y. St. Rep. 537.

<sup>14</sup> *Georgia*.—*Merchants' Nat. Bank v. Armstrong*, 107 Ga. 479, 33 S. E. 473.

*Kentucky*.—*Proctor Coal Co. v. Tye & Denham*, 123 Ky. 381, 96 S. W. 512, 29 Ky. L. Rep. 804; *Martin v. Smith*, 110 S. W. 413; *Johnson v. Breckinridge*, 4 Ky. L. Rep. 994 (abstract).

*Minnesota*.—*Weicher v. Cargill*, 86 Minn. 271, 90 N. W. 402.

*Nebraska*.—*Jones v. Duff Grain Co.*, 69 Neb. 91, 95 N. W. 1; *Lewis v. Omaha St. R. Co.*, 114 N. W. 281.

*New York*.—*Brown v. New York*, 11 Hun 21; *Corbit v. Watson*, 88 App. Div. 467, 85 N. Y. S. 125; *Sullivan v. McCann*, 113 App. Div. 61, 37 Civ. Proc. 113, 98 N. Y. S. 947; *In re Ed-*

*ward Key Co.*, 114 App. Div. 467, 99 N. Y. S. 982.

*Texas*.—*Thomas v. Morrison*, 46 S. W. 46; *Marschall v. Smith*, 132 S. W. 812.

<sup>15</sup> *Radley v. Gaylor*, 98 App. Div. 158, 90 N. Y. S. 758; *Kuehn v. Syracuse Rapid Transit R. Co.*, 104 App. Div. 580, 93 N. Y. S. 883, *affirmed* 186 N. Y. 567, 79 N. E. 1109; *In re Kaufman*, 113 N. Y. S. 525; *Gulf, C. & S. F. R. Co. v. Eldredge*, 35 Tex. Civ. App. 467, 80 S. W. 556.

<sup>16</sup> *Merchants' Nat. Bank v. Armstrong*, 107 Ga. 479, 33 S. E. 473.

<sup>17</sup> N. Y. Judiciary Law, § 475.

<sup>18</sup> *In re King*, 168 N. Y. 53, 60 N. E. 1051, *modifying* 61 App. Div. 152, 70 N. Y. S. 356; *Corbit v. Watson*, 88 App. Div. 467, 85 N. Y. S. 125; *Sullivan v. McCann*, 113 App. Div. 61, 37 Civ. Proc. 113, 98 N. Y. S. 947.

there is no room for determining the amount due an attorney where his compensation is fixed by a contract with his client, and judgment has been entered in the cause.<sup>19</sup> In Virginia, however, it has been held that where an attorney has a lien for money advanced his client to pay for land purchased in a pending suit, the better practice is not to enforce the lien in that suit, and thereby keep other parties in court who have no interest in that question, but to make a proper decree for the protection of the attorney, giving him leave to enforce it in an independent suit for that purpose.<sup>20</sup>

### § 662. Petition for Determination and Enforcement. —

The petition of an attorney for the determination and enforcement of his lien, as stated in the preceding section, should show his employment by the client, the performance of the duties undertaken by him or some sufficient excuse for their nonperformance, the value of his services, the accrual of a lien therefor, and the refusal or neglect of the client to pay the same;<sup>1</sup> and in some jurisdictions the petition should show that the client is financially irresponsible.<sup>2</sup> So, the petition should show notice or filing of the lien where those elements are required by statute.<sup>3</sup> It is not necessary to allege bad faith.<sup>4</sup> An attorney's affidavit in answer to an order to show cause why the action should not be dismissed on a stipulation entered into between the parties, in which the attorney makes no objection to the dismissal provided an allowance is made for his fees, which affidavit was not served on his client, cannot be treated as a petition for the determination and enforcement of the attorney's lien.<sup>5</sup>

<sup>19</sup> *Serwer v. Sarasohn*, 91 App. Div. 538, 86 N. Y. S. 838. And see also, *supra*, § 439.

<sup>20</sup> *Fitzgerald's Ex'r v. Irby*, 99 Va. 81, 37 S. E. 777, 3 Va. Sup. Ct. Rep. 1.

<sup>1</sup> See *Merchants' Nat. Bank v. Armstrong*, 107 Ga. 479, 33 S. E. 473; *Smith v. Acker Process Co.*, 102 App. Div. 170, 92 N. Y. S. 351; *Ferris v. Lawrence*, 138 App. Div. 541, 123 N. Y. S. 209.

<sup>2</sup> *Smith v. Acker Process Co.*, 102 App. Div. 170, 92 N. Y. S. 351. And see also, *infra*, § 680.

<sup>3</sup> See, *supra*, §§ 600-605.

<sup>4</sup> *Proctor Coal Co. v. Tye*, 123 Ky. 381, 96 S. W. 512, 29 Ky. L. Rep. 804.

<sup>5</sup> *Sullivan v. McCann*, 113 App. Div. 61, 37 Civ. Proc. 113, 98 N. Y. S. 947.

### § 663. Against Whom Petition May Be Presented. —

In New York it has been held that the provision of the statute for the determination and enforcement of attorneys' liens is intended to be effective only as between attorney and client, and cannot be used for enforcing the claim of the plaintiff's attorney for his compensation as against the defendant, who has settled with the plaintiff,<sup>6</sup> even though such defendant agreed to pay any lien which plaintiff's attorney might establish on the cause of action.<sup>7</sup> In other jurisdictions, however, the procedure under discussion is available for the determination and enforcement of attorneys' liens as against the defendant, as well as against the client; indeed, in many states the client is not a necessary party in proceedings of this character.<sup>8</sup> The client may be proceeded against by petition, even though he disputes the amount due the attorney.<sup>9</sup>

### § 664. Necessary Parties. —

It has been quite generally held that the client is not a necessary party to a petition for the determination and enforcement of the attorney's lien.<sup>10</sup> So, where a suit against testamentary trustees, for a construction of the will and an accounting, was discontinued by agreement, but no moneys were paid or agreed to be paid without the knowledge or consent of the plaintiff's attorney, it was held that the trustees were not proper parties to a proceeding for the determination of the attorney's lien.<sup>11</sup> And in a suit to establish an attorney's lien against a judgment for alimony, which had been paid into court, it was held that the judgment debtor was not a necessary party.<sup>12</sup> In

<sup>6</sup> *Rochfort v. Metropolitan St. R. Co.*, 50 App. Div. 261, 30 Civ. Proc. 285, 63 N. Y. S. 1036; *In re Winkler*, 154 App. Div. 532, 139 N. Y. S. 755; *Zimmer v. Metropolitan St. R. Co.*, 32 Misc. 262, 65 N. Y. S. 977; *Dunowith v. Marks*, 84 N. Y. S. 453. See also *In re Lexington Ave.*, 30 App. Div. 602, 27 Civ. Proc. 245, 52 N. Y. S. 203, *affirmed*, 157 N. Y. 678, 51 N. E. 1092.

<sup>7</sup> *Pilkington v. Brooklyn Heights R. Co.*, 49 App. Div. 22, 30 Civ. Proc. 276, 63 N. Y. S. 211.

<sup>8</sup> See the following section.

<sup>9</sup> *Commercial Telegram Co. v. Smith*, 19 Civ. Proc. 32, 10 N. Y. S. 433.

<sup>10</sup> *Kansas Pac. R. Co. v. Thacher*, 17 Kan. 92; *Proctor Coal Co. v. Tye*, 123 Ky. 381, 96 S. W. 512, 29 Ky. L. Rep. 804; *Aspinwall v. Sabin*, 22 Neb. 73, 34 N. W. 72, 3 Am. St. Rep. 258.

<sup>11</sup> *Sullivan v. McCann*, 115 App. Div. 146, 100 N. Y. S. 739.

<sup>12</sup> *Hubbard v. Ellithorpe*, 135 Ia. 259, 112 N. W. 796, 124 Am. St. Rep. 271.

New York, however, it has been held that the client, being entitled to the fund subject to the lien of the attorney, has a right to be heard as to the existence and enforcement of the lien, and is, therefore, a necessary party in such a proceeding, and he may be served by substituted process if he has departed from the state;<sup>13</sup> but in that jurisdiction the enforcement of an attorney's lien by petition to the court is confined to enforcement against the client alone.<sup>14</sup>

§ 665. **Determination of Amount Due.**—In determining the amount due an attorney the court may order a reference, and this is the usual practice where the facts and circumstances presented by the moving papers indicate that a thorough hearing should be had.<sup>15</sup> This practice is not only sanctioned by long usage and repeated approval, but it is peculiarly adapted to the ascertainment of the truth in cases where reckless affidavit making, or discreet silence upon essential particulars, may give the whole controversy a false atmosphere.<sup>16</sup> But the referee can only take evidence and report thereon. The court must determine the amount due.<sup>17</sup> And where a reference is ordered to determine the amount due under an agreement, the referee cannot ignore such agreement and find for the attorney on a *quantum meruit*.<sup>18</sup> In some jurisdictions disputes of this character may be submitted to a jury trial.<sup>19</sup> There are many cases, however, in which a reference or trial by jury is neither necessary nor desirable, and this is particularly true where the facts are not disputed, or where the

<sup>13</sup> *Oishei v. Pennsylvania R. Co.*, 117 App. Div. 110, 119, 102 N. Y. S. 368, 374, *affirmed*, 191 N. Y. 544, 85 N. E. 1113. See also *Oishei v. Pennsylvania R. Co.*, 101 App. Div. 473, 91 N. Y. S. 1034; *In re Winkler*, 146 App. Div. 927, 131 N. Y. S. 124.

<sup>14</sup> See the preceding section.

<sup>15</sup> *Colorado*.—*Fillmore v. Wells*, 10 Colo. 228, 15 Pac. 343, 3 Am. St. Rep. 567.

*Minnesota*.—*Weicher v. Cargill*, 86 Minn. 271, 90 N. W. 402.

*New Jersey*.—See *Barnes v. Taylor*, 30 N. J. Eq. 467.

*New York*.—*Thomasson v. Latour-ette*, 63 App. Div. 408, 71 N. Y. S. 559; *Cohn v. Polstein*, 41 Misc. 431, 84 N. Y. S. 1072.

*Pennsylvania*.—See *McKelvy's Appeal*, 108 Pa. St. 615.

<sup>16</sup> *In re Speranza*, 186 N. Y. 280, 78 N. E. 1070, *reversing* 114 App. Div. 913, 100 N. Y. S. 1144.

<sup>17</sup> *In re Edward Ney Co.*, 114 App. Div. 467, 99 N. Y. S. 982.

<sup>18</sup> *In re Department of Public Works*, 167 N. Y. 501, 60 N. E. 781.

<sup>19</sup> *Weicher v. Cargill*, 86 Minn. 271, 90 N. W. 402.

amount due is to be determined from the construction of an unambiguous writing.<sup>20</sup>

**§ 666. Order and Appeal Therefrom.**—Under the New York statute it has been held that a proceeding for the determination and enforcement of an attorney's lien is a special proceeding, and not an action, and a judgment in favor of the attorney is not authorized; but the determination should be in the form of an order adjudging that the attorney has a lien for a certain sum. An appeal from the order entered therein is not an appeal from a judgment rendered after the trial of an issue of fact in an action; but the appellate division will review the determination of the special term, both upon the facts and the law, and grant to either party the relief to which he is entitled.<sup>1</sup>

### *Other Summary Enforcement.*

**§ 667. Generally.**—Unless precluded by statutory regulation, courts may exercise summary jurisdiction in the enforcement of attorneys' liens, at least in some cases. Thus, it has been held that the court retains jurisdiction over a judgment until it has been fully executed, and may hear any motion which affects it; and if, during that time, the attorney desires to have his lien established, he may apply to the court for that purpose, the parties to the action being served with notice of the hearing.<sup>2</sup> So, the court may require the payment of an attorney's lien as a condition of the discontinuance or dismissal of the cause,<sup>3</sup> or the entry of a judgment for a stipulated amount where the parties have compromised;<sup>4</sup> or the lien may be merely declared summarily, and ordered to be enforced in an independent action.<sup>5</sup> It has also

<sup>20</sup> *In re Kaufman*, 113 N. Y. S. 525; *Illinois Cent. R. Co. v. Wells*, 104 Tenn. 706, 59 S. W. 1041.

<sup>1</sup> *Sullivan v. McCann*, 124 App. Div. 126, 108 N. Y. S. 909.

<sup>2</sup> *Per Stewart, J.*, concurring in *Dahlstrom v. Featherstone*, 18 Idaho 179, 110 Pac. 243.

<sup>3</sup> *National Exhibition Co. v. Crane*,

167 N. Y. 505, 60 N. E. 768, *affirming* 54 App. Div. 175, 8 N. Y. Ann. Cas. 231, 66 N. Y. S. 361. See also *supra*, § 646.

<sup>4</sup> *Illinois Cent. R. Co. v. Wells*, 104 Tenn. 706, 59 S. W. 1041. And see also *supra*, §§ 640-645.

<sup>5</sup> *Fitzgerald's Ex'x v. Irby*, 99 Va. 81, 37 S. E. 777, 3 Va. Sup. Ct. Rep. 1.

been held that the court may summarily enter an order to prevent the distribution of assets upon which an attorney's lien is claimed.<sup>6</sup> So too an attorney's lien, set up in summary proceedings to compel him to pay over money collected for his client, will be adjusted in that proceeding, and judgment rendered requiring him to pay over any balance.<sup>7</sup> Nor will a defendant who has been arrested in a civil action be discharged until the fees of the plaintiff's counsel have been paid, even though the plaintiff has released his cause of action against the defendant, and consented to his discharge.<sup>8</sup> Even after a judgment has been satisfied, it has been held that it may be reinstated where it appears that such satisfaction is in fraud of the attorney's rights.<sup>9</sup> But a judgment which has been affirmed on appeal will not thereafter be amended so as to direct the payment of costs due an attorney; in such case the attorney must proceed in the usual way for the determination and enforcement of his lien.<sup>10</sup> In all instances of summary procedure it is essential that the client should have notice and an opportunity to be heard.<sup>11</sup> In Georgia the lien is foreclosed by rule in the same manner as mortgages on land.<sup>12</sup>

**§ 668. Issuing Execution.** — In several jurisdictions it is allowable to issue execution for the enforcement of an attorney's lien which has accrued for services rendered in procuring a judgment which has been settled by the parties in fraud of the attorney's rights.<sup>13</sup> And where an attorney sued to subject property,

<sup>6</sup> *Merchants' Nat. Bank v. Armstrong*, 107 Ga. 479, 33 S. E. 473.

<sup>7</sup> *Wolfe v. Mack*, 81 Misc. 185, 142 N. Y. S. 433.

<sup>8</sup> *Crouch v. Hoyt*, 24 Civ. Proc. 60, 1 N. Y. Ann. Cas. 76, 30 N. Y. S. 406. See also *Branth v. Branth*, 57 Hun 592, 19 Civ. Proc. 28, 10 N. Y. S. 638.

<sup>9</sup> *Dahlstrom v. Featherstone*, 18 Idaho 179, 110 Pac. 243. See also § 668.

<sup>10</sup> *People v. Buffalo*, 9 Misc. 403, 29 N. Y. S. 1071.

<sup>11</sup> *Ex p. Smithson*, 108 Tenn. 442, 67 S. W. 864. See also *Dahlstrom v.*

*Featherstone*, 18 Idaho 179, 110 Pac. 243.

<sup>12</sup> *The venue* of such proceeding is the county wherein the land to be reached lies. It is not such a civil case as must be brought in the county of the defendant's residence. *Moss v. Strickland*, 138 Ga. 539, 75 S. E. 622.

<sup>13</sup> *Connecticut*.—*Andrews v. Morse*, 12 Conn. 444.

*Georgia*.—*Tarver v. Tarver*, 53 Ga. 43.

*Minnesota*.—*Northrup v. Hayward*, 102 Minn. 307, 12 Ann. Cas. 341, 113 N. W. 701.

which had been fraudulently conveyed, to a judgment recovered by him in another case, it was held that he might issue execution against the fraudulent grantee for the services rendered in both cases, although such grantee was not a party to the original suit.<sup>14</sup> So, it has been held that where a body execution would lie against a judgment debtor at the instance of the client, such execution may be issued by the attorney for the recovery of a lien which has accrued to him for services rendered in procuring the judgment.<sup>15</sup> And where the parties enter satisfaction of a judgment in fraud of the attorney's rights, such satisfaction may, in some jurisdictions at least, be set aside, and an execution allowed to the extent of the attorney's lien.<sup>16</sup> Nor will the attorney be prevented from issuing execution against several defendants by the fact that one of them has taken an appeal in his own interest only.<sup>17</sup> In some states it is required that the nature and extent of the lien should be judicially determined before the execution may issue.<sup>18</sup>

**§ 669. Order on Sheriff or Assignee of Judgment to Pay over Fund.**—In some jurisdictions an attorney's lien may be enforced summarily by an order to show cause why the proceeds of the judgment should not be paid over to the attorney to the extent of his lien.<sup>19</sup> Thus, where an execution has been issued

*Missouri.*—*Young v. Renshaw*, 102 Mo. App. 173, 76 S. W. 701; *Curtis v. Metropolitan St. R. Co.*, 118 Mo. App. 341, 94 S. W. 762; *Smoot v. Shy*, 159 Mo. App. 126, 139 S. W. 239.

*Nebraska.*—*Jones v. Duff Grain Co.*, 69 Neb. 91, 95 N. W. 1.

*New York.*—*Bloch v. Bloch*, 136 App. Div. 770, 121 N. Y. S. 475; *Albert Palmer Co. v. Van Orden*, 49 Super. Ct. 89, 64 How. Pr. 79, 4 Civ. Proc. 44; *Commercial Tel. Co. v. Smith*, 19 Civ. Proc. 32, 10 N. Y. S. 433; *Ackerman v. Ackerman*, 11 Abb. Pr. 256. See also *Moore v. Taylor*, 2 How. Pr. N. S. 343; *Merchant v. Sessions*, 5 Civ. Proc. 24.

*14* *Morrell v. Miller*, 36 Ore. 412, 59 Pac. 710.

*15* *Hobson v. Watson*, 34 Me. 20, 56 Am. Dec. 632.

*16* *Northrup v. Hayward*, 102 Minn. 307, 12 Ann. Cas. 341, 113 N. W. 701; *Young v. Renshaw*, 102 Mo. App. 173, 76 S. W. 701; *Smoot v. Shy*, 159 Mo. App. 126, 139 S. W. 239; *Jones v. Duff Grain Co.*, 69 Neb. 91, 95 N. W. 1; *Ackerman v. Ackerman*, 11 Abb. Pr. (N. Y.) 256. Compare *Crotty v. McKenzie*, 42 Super. Ct. (N. Y.) 192. And see also the preceding section.

*17* *Commercial Telegram Co. v. Smith*, 57 Hun 176, 19 Civ. Proc. 32, 10 N. Y. S. 433.

*18* *Jones v. Duff Grain Co.*, 69 Neb. 91, 95 N. W. 1.

*19* *Gray v. Maxwell*, 50 Ga. 108;



by an assignee of the plaintiff, it has been held that the sheriff may be stayed from paying the proceeds of the execution sale to such assignee until the amount of the attorney's compensation can be ascertained.<sup>20</sup> So, it seems that an attorney may move for the payment over of the proceeds to him by the assignee.<sup>1</sup>

**§ 670. Intervention in Proceedings for Revival of Judgment.** — An attorney who has a lien on a judgment may intervene in proceedings for the revival thereof where such action is necessary for his protection, or he may proceed to a revival thereof in his own name to the extent of his lien. And that the court, in any such proceeding, should render a judgment for the attorney and against the judgment debtor for the amount of the lien, instead of entering an order of revivor in the name of the attorney to that extent, is without prejudice to the judgment debtor.<sup>2</sup>

**§ 671. Enforcement by Appeal and in Appellate Court.** — It has been held that an attorney may appeal from a judgment against his client, although the client is satisfied therewith, for the purpose of obtaining a more favorable judgment, so that he may enforce his lien against the adverse party;<sup>3</sup> but it seems that an attorney may not so appeal against his client's consent.<sup>4</sup> In some jurisdictions the attorney will be protected in his compensation by the appellate court as against a settlement made by the parties pending proceedings for review; thus, under such circumstances, an appeal has been dismissed without prejudice to any right which the attorney might have in the premises.<sup>5</sup> And it has been held that a plaintiff in error will not be allowed to withdraw the writ over the objection of his counsel where such action would

Haynes v. Perry, 76 Ga. 33. See also Harney v. Demoss, 3 How. (Miss.) 174; Pugh v. Boyd, 38 Miss. 326.

<sup>20</sup> Loaners' Bank v. Nostrand, 53 Super. Ct. (N. Y.) 525.

<sup>1</sup> In re Gates, 51 App. Div. 350, 31 Civ. Proc. 88, 64 N. Y. S. 1050. And see also *supra*, §§ 648, 649, as to assignments by the client as affecting the attorney's lien generally.

<sup>2</sup> Greek v. McDaniel, 68 Neb. 569, 94 N. W. 518.

<sup>3</sup> Adsit v. Hall, 3 How. Pr. N. S. (N. Y.) 373.

<sup>4</sup> Morrison v. Green, 96 Ga. 754, 23 S. E. 845; Nixon v. Ossenbeck, 129 Ky. 588, 112 S. W. 645.

<sup>5</sup> Atlantic & G. C. Canal & Okeechobee Land Co. v. Kinsman, 29 Fla. 332, 10 So. 555.

result in depriving the attorney of his lien rights.<sup>6</sup> And where an attorney anticipates that the retention of jurisdiction by an appellate court may prevent him from enforcing his lien, it seems that he may raise the question of his right to dismiss the appeal.<sup>7</sup> On the other hand, it has been held that an appeal from a judgment, subsequently satisfied, will not be heard merely for the purpose of protecting the rights of the plaintiff's attorney, and that, in such case, the attorney's remedy is by motion in the court below.<sup>8</sup> Nor will a cause which has been dismissed be reinstated on motion of the defendant's attorney, who claims a lien on the judgment.<sup>9</sup>

**§ 672. Taking Judgment by Default.** — Where the parties settle before the return day without the knowledge of the plaintiff's attorney, such attorney may enter judgment by default on the failure of the defendant to answer, and enforce the same to the extent of his lien.<sup>10</sup> And the judgment so entered will not be opened, unless the attorney's lien is paid,<sup>11</sup> in the absence of good reason for such action.<sup>12</sup> In some jurisdictions, however, a default judgment, taken under the circumstances above described, will be opened where it appears that the settlement was honestly made and that the client is a responsible person, or where the fees of his counsel have been secured by the settlement.<sup>13</sup>

*Prosecuting Original Suit to Final Judgment.*

**§ 673. Right to Prosecute Original Suit.** — The right of an attorney to enforce his charging lien by the prosecution of the

<sup>6</sup> *Walker v. Equitable Mortg. Co.*, 114 Ga. 862, 40 S. E. 1010.

<sup>7</sup> *Wait v. Atchison, T. & S. F. R. Co.*, 204 Mo. 491, 103 S. W. 60.

<sup>8</sup> *Cock v. Palmer*, 1 Robt. (N. Y.) 658, 19 Abb. Pr. 372. See also *McDowell v. Appleby*, 1 How. Pr. (N. Y.) 229.

<sup>9</sup> *Platt v. Jerome*, 19 How. 384, 15 U. S. (L. ed.) 623.

<sup>10</sup> *Gallison & Hobron Co. v. Rawak*, 3 N. Y. S. 802. See also *Coster v.*

*Greenpoint Ferry Co.*, 5 Civ. Proc. 146, *affirmed* 98 N. Y. 660; *Wood v. Trustees of Northwest Presbyterian Church*, 7 Abb. Pr. (N. Y.) 210 note.

<sup>11</sup> *Coster v. Greenpoint Ferry Co.*, 5 Civ. Proc. 146, *affirmed* 98 N. Y. 660.

<sup>12</sup> In *Rodgers v. Furse*, 83 Ga. 115, 9 S. E. 669, it was held that a default judgment would be opened where the defendant was misled by the plaintiff's attorney as to the time of trial.

<sup>13</sup> *Publishers' Printing Co. v. Gillin*

original suit to final judgment has been recognized in many cases,<sup>14</sup> though it has been said to rest in discretion.<sup>15</sup> This method of

Printing Co., 16 Misc. 558, 38 N. Y. S. 784, *reversing* 15 Misc. 464, 37 N. Y. S. 198.

<sup>14</sup>*United States*.—Eldridge *v.* The Ashley, 2 N. Y. Leg. Obs. 68, 8 Fed. Cas. No. 4, 333; Gaines *v.* Travis, Abb. Adm. 297, 9 Fed. Cas. No. 5,179; The Planet, 1 Spr. 11, 19 Fed. Cas. No. 11,204; The Victory, 1 Blatchf. & H. 443, 28 Fed. Cas. No. 16,937; Herman *v.* Metropolitan St. R. Co., 121 Fed. 184.

*Connecticut*.—De Wandelaer *v.* Sawdey, 78 Conn. 654, 63 Atl. 446.

*Georgia*.—McDonald *v.* Napier, 14 Ga. 89; Jones *v.* Morgan, 39 Ga. 310, 99 Am. Dec. 458; Coleman *v.* Ryan, 58 Ga. 132; Manning *v.* Manning, 61 Ga. 137; Little *v.* Sexton, 89 Ga. 411, 15 S. E. 490, *distinguishing* Haynes *v.* Perry, 76 Ga. 33; Brown *v.* Georgia, C. & N. R. Co., 101 Ga. 80, 28 S. E. 634; Johnson *v.* McCurry, 102 Ga. 471, 31 S. E. 88; Atlanta R. & Power Co. *v.* Owens, 119 Ga. 833, 47 S. E. 213; Penn *v.* McGhee, 6 Ga. App. 631, 65 S. E. 686; Collier, Stephens & Co. *v.* Hecht-Brettingham Co., 7 Ga. App. 178, 66 S. E. 400.

*Indiana*.—Miedreich *v.* Rank, 40 Ind. App. 393, 82 N. E. 117, *distinguishing* Hanna *v.* Island Coal Co., 5 Ind. App. 163, 31 N. E. 846, 51 Am. St. Rep. 246.

*Kentucky*.—Martin *v.* Smith, 110 S. W. 413, 33 Ky. L. Rep. 582.

*Michigan*.—Weeks *v.* Wayne Circuit Judges, 73 Mich. 256, 41 N. W. 269; Carpenter *v.* Myers, 90 Mich. 209, 51 N. W. 206; Heavenrich *v.* Alpena Circuit Judge, 111 Mich. 163, 69 N. W. 226; Grand Rapids & I. R. Co. *v.* Che-

boygan Circuit Judge, 161 Mich. 181, 126 N. W. 56, 17 Detroit Leg. N. 270.

*Nebraska*.—Reynolds *v.* Reynolds, 10 Neb. 574, 7 N. W. 322; Lewis *v.* Omaha St. R. Co., 114 N. W. 281.

*New York*.—Pickard *v.* Yencer, 21 Hun 403, 10 N. Y. Wkly. Dig. 271; Wilber *v.* Baker, 24 Hun 24; Keeler *v.* Keeler, 51 Hun 505, 4 N. Y. S. 580; Hart *v.* New York, 69 Hun 237, 23 N. Y. S. 555, *affirmed* 139 N. Y. 610, 35 N. E. 204; Pilkington *v.* Brooklyn Heights R. Co., 49 App. Div. 22, 30 Civ. Proc. 276, 63 N. Y. S. 211; Schriever *v.* Brooklyn H. R. Co., 49 App. Div. 629, 63 N. Y. S. 217; Oliwill *v.* Verdenhalven, 26 N. Y. St. Rep. 115, 7 N. Y. S. 99; Stahl *v.* Wadsworth, 13 Civ. Proc. 32, 10 N. Y. St. Rep. 228; Washburn *v.* Mott, 19 Civ. Proc. 439, 12 N. Y. S. 111; Kehoe *v.* Miller, 10 Abb. N. Cas. 393; Deutsch *v.* Webb, 10 Abb. N. Cas. 393; Tullis *v.* Bushnell, 12 Daly 217, 65 How. Pr. 465; McCabe *v.* Fogg, 60 How. Pr. 488; Talcott *v.* Bronson, 4 Paige 501.

*Oregon*.—Jackson *v.* Stearns, 48 Ore. 25, 84 Pac. 798, 5 L.R.A. (N.S.) 390.

*Texas*.—Powell *v.* Galveston, H. & S. A. R. Co., 78 S. W. 975.

*Utah*.—Potter *v.* Ajax Min. Co., 19 Utah 421, 57 Pac. 270.

*Washington*.—Cline Piano Co. *v.* Sherwood, 57 Wash. 239, 106 Pac. 742.

*West Virginia*.—Burkhart *v.* Scott, 69 W. Va. 694, 72 S. E. 784.

*Wisconsin*.—Howard *v.* Osceola, 22 Wis. 453; Smelker *v.* Chicago & N. W. R. Co., 106 Wis. 135, 81 N. W. 994.

<sup>15</sup>Howard *v.* Ward, (S. D.) 139 N. W. 771.

enforcement is usually adopted where the parties have settled without the consent of the attorney, and, of course, is only available where such settlement, and the means adopted to effect it, are not binding on the attorney.<sup>16</sup> In New York it seems that this method must be pursued by an attorney who wishes to enforce his lien against the adverse party,<sup>1</sup> excepting where an independent action will lie.<sup>2</sup> In some jurisdictions a defendant's attorney is entitled to a lien for services rendered in connection with the establishment of a counterclaim, and circumstances may possibly arise where an action in which such a counterclaim has been asserted might be continued for the protection of the defendant's attorney;<sup>3</sup> ordinarily, however, the defendant's attorney may not continue an action to final judgment for the purpose of recovering compensation therein.<sup>4</sup> In other states this method of enforcing an attorney's lien is not recognized.<sup>5</sup>

§ 674. Procedure. — There is little or no uniformity in the practice of the several states as to the continuation of the action by an attorney for the purpose of enforcing his lien; indeed, the decisions on this subject in any one state show but little harmony; and, in view of this fact, one jurist has stated that the right of an attorney to proceed in this manner is "fanciful at best," and that the decisions thereon were "a bundle of confusion."<sup>6</sup> As a general rule, it is necessary to obtain leave of court to continue the

<sup>16</sup> See *supra*, §§ 640-646.

<sup>1</sup> See *supra*, § 663.

<sup>2</sup> See *infra*, §§ 676-683.

<sup>3</sup> See Mo. Sess. L. (1901), p. 46, § 1; N. Y. Judiciary Law, § 475; Utah Comp. Stat. § 135. And see also *supra*, § 598.

<sup>4</sup> *Morrison v. Green*, 96 Ga. 754, 23 S. E. 845, *distinguishing* *Fry v. Calder*, 74 Ga. 7; *Florida Cent. & P. R. Co. v. Ragan*, 104 Ga. 353, 30 S. E. 745; *Saranac & Lake Placid R. Co. v. Arnold*, 37 Misc. 514, 75 N. Y. S. 1003, *affirmed* 72 App. Div. 620, 76 N. Y. S. 1032; *Pomeranz v. Marcus*, 40 Misc.

442, 82 N. Y. S. 707, *appeal dismissed* 86 App. Div. 321, 83 N. Y. S. 711; *Howard v. Riker*, 11 Abb. N. Cas. (N. Y.) 113; *Yoakley v. Hawley*, 5 Lea (Tenn.) 670.

<sup>5</sup> *Lamont v. Washington & Georgetown R. Co.*, 2 Mackey (D. C.) 502, 47 Am. Rep. 268; *Story v. Hull*, 143 Ill. 506, 32 N. E. 265; *Farry v. Davidson*, 44 Kan. 377, 24 Pac. 419; *Rind v. Hunsicker*, 24 La. Ann. 571; *Yonge v. St. Louis Transit Co.*, 109 Mo. App. 235, 84 S. W. 184.

<sup>6</sup> Per Gaynor, J., in *Burpee v. Townsend*, 29 Misc. 681, 61 N. Y. S. 467.

action.<sup>7</sup> And where a settlement has been entered, or the action has been discontinued or dismissed, the attorney should first move to vacate such settlement, dismissal, or discontinuance, and in connection therewith he may ask leave to proceed with the action for the protection of his lien;<sup>8</sup> in some cases, however, it seems to have been held that a motion to vacate is unnecessary.<sup>9</sup> It has also been held that the attorney may prosecute the action for his own benefit in the name of his client,<sup>10</sup> and that he should file a petition in his own name against both plaintiff and defendant, setting forth his claim and lien, to which answers may be filed and issues made up;<sup>11</sup> while in another jurisdiction it is held that the proper procedure is for the attorney to present his claim to the court, and that the defendant should then plead the settlement, and upon the issue so made the rights of the parties may be determined.<sup>12</sup> On the trial of the issue the attorney must establish not only his claim and lien therefor, but also the defendant's liability to the plaintiff;<sup>13</sup> and should he fail to do so, it seems that he must assume the payment of any judgment for costs which the adverse party may recover.<sup>14</sup>

<sup>7</sup> *Kretsinger v. Weber*, 43 Neb. 468, 61 N. W. 718; *Doyle v. New York, O. & W. R. Co.*, 66 App. Div. 398, 72 N. Y. S. 936; *Goddard v. Trenbath*, 24 Hun (N. Y.) 182; *Oliwill v. Verdenhalven*, 17 Civ. Proc. 362, 26 N. Y. St. Rep. 115, 7 N. Y. S. 99; *Dimick v. Cooley*, 3 Civ. Proc. (N. Y.) 141; *Washburn v. Mott*, 19 Civ. Proc. 439, 12 N. Y. S. 111. Compare *Forstman v. Schulting*, 35 Hun (N. Y.) 504.

<sup>8</sup> *Grand Rapids & I. R. Co. v. Cheboygan Circuit Judge*, 161 Mich. 181, 126 N. W. 56, 17 Detroit Leg. N. 270; *Pickard v. Yencer*, 21 Hun 403, 10 N. Y. Wkly. Dig. 271. And see also *supra*, § 658.

<sup>9</sup> *Wilbur v. Baker*, 24 Hun (N. Y.) 24; *Kehoe v. Miller*, 10 Abb. N. Cas. (N. Y.) 393. See also *Yonge v. St. Louis Transit Co.*, 109 Mo. App. 235, 84 S. W. 184.

<sup>10</sup> *O'Brien v. Metropolitan St. R. Co.*, 27 App. Div. 1, 27 Civ. Proc. 152, 50 N. Y. S. 159.

<sup>11</sup> *Reynolds v. Reynolds*, 10 Neb. 574, 7 N. W. 322.

<sup>12</sup> *Grand Rapids & I. R. Co. v. Cheboygan Circuit Judge*, 161 Mich. 181, 126 N. W. 56, 17 Detroit Leg. N. 270.

<sup>13</sup> *Gray v. Lawson*, 36 Ga. 629; *Atlanta R. & Power Co. v. Owens*, 119 Ga. 833, 47 S. E. 213; *Casucci v. Alleghany & K. R. Co.*, 65 Hun 452, 29 Abb. N. Cas. 252, 20 N. Y. S. 343; *Smelker v. Chicago & N. W. R. Co.*, 106 Wis. 135, 81 N. W. 994. Compare *Barthwell v. Chicago, M. & St. P. R. Co.*, 138 Ia. 688, 116 N. W. 813; *Yonge v. St. Louis Transit Co.*, 109 Mo. App. 235, 84 S. W. 184.

<sup>14</sup> *O'Brien v. Metropolitan St. R. Co.*, 27 App. Div. 1, 27 Civ. Proc. 152, 50 N. Y. S. 159.

§ 675. **Permission to Prosecute Denied.** — An attorney will not be permitted to prosecute an action to final judgment in all cases, even though compensation may be owing to him for services rendered therein.<sup>15</sup> It is well settled that fair, honest settlements of litigation by the parties themselves, whether with or without the knowledge and consent of counsel, are approved by the law;<sup>16</sup> and formerly it was necessary, in order to warrant the granting of an order permitting an attorney to prosecute the suit to final judgment, to show that a fraud was perpetrated upon him;<sup>17</sup> though it is not necessary now, in most jurisdictions at least, to show the existence of actual fraud.<sup>18</sup> It was also formerly held that actions which were not assignable, as, for instance, those for personal injuries and other torts, and also actions for unliquidated damages, could not be continued by the attorney for his own protection after the parties had settled them;<sup>19</sup> but in several jurisdictions an attorney's lien now exists for services rendered in actions of this character, and, where this is so, such action may be continued by the attorney should the circumstances warrant it.<sup>20</sup> Nor will an attorney be permitted to continue a matrimonial action for the recovery of his compensation; nor, indeed, as a general rule, may he acquire a lien which may be enforced therein.<sup>1</sup> So an attorney who fails to comply with statutory requirements which are essential to render his lien effective,<sup>2</sup>

<sup>15</sup> *Pitcher v. Robertson*, 66 Hun 632 mem., 21 N. Y. S. 66; *Burpee v. Townsend*, 29 Misc. 681, 61 N. Y. S. 467.

<sup>16</sup> See *supra*, §§ 640-645.

<sup>17</sup> *Dolliver v. American Swan Boat Co.*, 32 Misc. 264, 8 N. Y. Ann. Cas. 74, 31 Civ. Proc. 94, 65 N. Y. S. 978. See also *Schriever v. Brooklyn Heights R. Co.*, 30 Misc. 145, 30 Civ. Proc. 67, 61 N. Y. S. 641, 890; *Rasquin v. Knickerbocker Stage Co.*, 21 How. Pr. (N. Y.) 293, 12 Abb. Pr. 324; *Tompkins v. Nashville, C. & St. L. R. Co.*, 110 Tenn. 157, 72 S. W. 116, 100 Am. St. Rep. 795, 61 L.R.A. 340.

<sup>18</sup> *Young v. Howell*, 61 App. Div.

246, 72 N. Y. S. 5; *McCabe v. Fogg*, 60 How. Pr. (N. Y.) 488.

<sup>19</sup> *Voigt Brewery Co. v. Donovan*, 103 Mich. 190, 61 N. W. 343; *Boogren v. St. Paul City R. Co.*, 97 Minn. 51, 106 N. W. 104, 114 Am. St. Rep. 391, 3 L.R.A. (N. S.) 379; *Pulver v. Harris*, 62 Barb. (N. Y.) 500; *Coughlin v. New York Cent. & H. R. R. Co.*, 71 N. Y. 443, 27 Am. Rep. 75, *modifying* 8 Hun 136; *Hutchinson v. Pettes*, 18 Vt. 614.

<sup>20</sup> See *supra*, § 616; and see generally, *supra*, §§ 613-633.

<sup>1</sup> See *supra*, § 637.

<sup>2</sup> See *supra*, §§ 600-605.

or one who has lost or waived his lien,<sup>3</sup> will not be permitted to continue an action for the purpose of recovering his compensation therein.<sup>4</sup> And in one jurisdiction at least it is held that an attorney will not be permitted to continue an action, as against the defendant, where it appears that his client is solvent, or where his compensation has been sufficiently provided for in the making of the settlement.<sup>5</sup> So, it has been held that an attorney will not be allowed to continue an action which his client was permitted to settle under an agreement with the attorney,<sup>6</sup> or an action which has abated;<sup>7</sup> nor will he be permitted to proceed with the action where he has been guilty of laches,<sup>8</sup> or where no lien has accrued in his favor,<sup>9</sup> or where it is manifest to the court that the continuance of the suit will not aid the attorney in recovering his fees.<sup>10</sup>

*Enforcement by Independent Action.*

§ 676. **By Action at Law.** — In many jurisdictions an attorney's charging lien may be enforced against the adverse party by an independent action at law,<sup>11</sup> and this is especially true where

<sup>3</sup> See *supra*, §§ 606-612.

<sup>4</sup> *The Bella*, 91 Fed. 540; *Nielsen v. Albert Lea*, 91 Minn. 388, 392, 98 N. W. 195, 197; *Lavender v. Atkins*, 20 Neb. 206, 29 N. W. 467; *Minto v. Baur*, 53 Hun 636 mem., 17 Civ. Proc. 314, 6 N. Y. S. 444, *modified* 55 Hun 609, 8 N. Y. S. 933.

<sup>5</sup> *New York*.—*In re Evans' Will*, 58 App. Div. 502, 10 N. Y. Ann. Cas. 32, 69 N. Y. S. 482, *rehearing denied*, 65 App. Div. 610, 72 N. Y. S. 493; *Young v. Howell*, 64 App. Div. 246, 72 N. Y. S. 5; *Smith v. Acker Process Co.*, 102 App. Div. 170, 92 N. Y. S. 351; *McKay v. Morris*, 35 Misc. 571, 72 N. Y. S. 23; *Rook v. Dickinson*, 38 Misc. 690, 11 N. Y. Ann. Cas. 454, 78 N. Y. S. 287; *Cohn v. Polstein*, 41 Misc. 431, 84 N. Y. S. 1072; *Witmark v. Perley*, 43 Misc. 14, 86 N. Y. S. 756; *Dimick v.*

*Cooley*, 3 Civ. Proc. 141; *Dumowith v. Marks*, 84 N. Y. S. 453.

<sup>6</sup> *In re Evans' Will*, 33 Misc. 567, 68 N. Y. S. 936.

<sup>7</sup> *Harris v. Tison*, 63 Ga. 629, 36 Am. Rep. 126.

<sup>8</sup> *Crisenza v. Auchmuty*, 121 App. Div. 611, 106 N. Y. S. 335.

<sup>9</sup> *Oliver v. Sheeley*, 11 Neb. 521, 9 N. W. 689; *Rook v. Dickinson*, 38 Misc. 690, 11 N. Y. Ann. Cas. 454, 78 N. Y. S. 287; *Seventh Ave. Meat & Provision Co. v. Del Favero*, 123 N. Y. S. 46.

<sup>10</sup> *Stearns v. Wollenberg*, 51 Ore. 88, 92 Pac. 1079, 14 L.R.A. (N.S.) 1095.

<sup>11</sup> *Colorado*.—*Flint v. Hubbard*, 16 Colo. App. 464, 66 Pac. 446.

*Georgia*.—*Suwannee Turpentine Co. v. Baxter*, 109 Ga. 597, 35 S. E. 142.

*Idaho*.—See *Dahlstrom v. Featherstone*, 18 Idaho 179, 110 Pac. 243.

the defendant has participated in a fraud upon the attorney,<sup>12</sup> though it is only by virtue of clear language in the statute that such proceedings are cognizable other than in equity.<sup>13</sup> In some states a lien acquired in an inferior court may be enforced by action in a court of record.<sup>14</sup> And in Missouri it has been held that an attorney's lien may be enforced by an action at law, even though there has been no verdict, report, decision, or judgment in the client's favor,<sup>15</sup> and whether the client is or is not financially responsible.<sup>16</sup> Of course, an action at law will also lie against the client for the enforcement of a lien which has accrued to his attorney;<sup>17</sup> but such action does not differ in any material respect from actions by attorneys to recover compensation generally. This subject has been considered heretofore.<sup>18</sup>

*Illinois*.—*Standidge v. Chicago R. Co.*, 254 Ill. 524, Ann. Cas. 1913C 65, 98 N. E. 963.

*Indiana*.—*Blankenbaker v. Bank of Commerce*, 85 Ind. 459.

*Iowa*.—*Hubbard v. Ellithorpe*, 135 Ia. 259, 112 N. W. 796, 124 Am. St. Rep. 271; *Barthell v. Chicago, M. & St. P. R. Co.*, 138 Ia. 688, 116 N. W. 813; *Jamison v. Ranck*, 140 Ia. 635, 119 N. W. 76.

*Kansas*.—*Farry v. Davidson*, 44 Kan. 377, 24 Pac. 419.

*Kentucky*.—*Proctor Coal Co. v. Tye*, 96 S. W. 512, 29 Ky. L. Rep. 804.

*Missouri*.—*O'Connor v. St. Louis Transit Co.*, 198 Mo. 622, 8 Ann. Cas. 703, 97 S. W. 150, 115 Am. St. Rep. 495; *Taylor v. St. Louis Transit Co.*, 198 Mo. 715, 97 S. W. 155; *Young v. Renshaw*, 102 Mo. App. 173, 76 S. W. 701; *Younge v. St. Louis Transit Co.*, 109 Mo. App. 235, 84 S. W. 184; *Whitwell v. Aurora*, 139 Mo. App. 597, 123 S. W. 1045; *Laughlin v. Excelsior Powder Mfg. Co.*, 153 Mo. App. 508, 134 S. W. 116; *Wolf v. United Rys. Co.*, 155 Mo. App. 125, 133 S. W. 1172.

*Montana*.—*Coombs v. Knox*, 28

Mont. 202, 72 Pac. 641; *Gilchrist v. Hore*, 34 Mont. 443, 87 Pac. 443.

A *justice of the peace* may, in some jurisdictions, entertain an action for the enforcement of attorneys' liens. *O'Connor v. St. Louis Transit Co.*, 198 Mo. 622, 8 Ann. Cas. 703, 97 S. W. 150, 115 Am. St. Rep. 495.

And courts of admiralty have jurisdiction of a suit by a proctor to recover his costs and fees after a private settlement between the parties. *McDonald v. The Cabot, Newb.* 348, 16 Fed. Cas. No. 8,759.

<sup>12</sup> *Powell v. Galveston, H. & S. A. R. Co. (Tex.)* 78 S. W. 975. And see also *supra*, § 642, as to fraudulent settlements generally.

<sup>13</sup> *Standidge v. Chicago R. Co.*, 254 Ill. 524, Ann. Cas. 1913C 65, 98 N. E. 963.

<sup>14</sup> *Tynan v. Mart*, 53 Misc. 49, 103 N. Y. S. 1033.

<sup>15</sup> *Yonge v. St. Louis Transit Co.*, 109 Mo. App. 235, 84 S. W. 184.

<sup>16</sup> *Yonge v. St. Louis Transit Co.*, 109 Mo. App. 235, 84 S. W. 184.

<sup>17</sup> *Lindner v. Hine*, 84 Mich. 511, 48 N. W. 43.

<sup>18</sup> See, *supra*, §§ 487-568.



An action at law is not maintainable for the enforcement of a lien against the adverse party in some jurisdictions.<sup>19</sup>

§ 677. **By Suit in Equity.**—So, an attorney's lien may be enforced by a suit in equity; and this, undoubtedly, is the most appropriate mode of enforcement, excepting, of course, where an exclusive method is provided by statute. Enforcement by a suit in equity is peculiarly applicable where no adequate remedy exists at law, and, in cases of this character, the equitable remedy is allowable notwithstanding the existence of a remedy at law by statute or otherwise.<sup>20</sup> Thus, it has been held in one jurisdiction

<sup>19</sup> *Tullis v. Bushnell*, 65 How. Pr. (N. Y.) 465; *Pennsylvania Co. v. Thatcher*, 78 Ohio St. 175, 85 N. E. 55; *Werner v. George Zehler Provision Co.*, 31 Ohio Cir. Ct. Rep. 632; *Smelker v. Chicago & N. W. R. Co.*, 106 Wis. 135, 81 N. W. 994.

<sup>20</sup> *United States*.—*Ingersoll v. Coram*, 127 Fed. 418; *Meighan v. American Grass Twine Co.*, 154 Fed. 346, 83 C. C. A. 124.

*Alabama*.—*Higley v. White*, 102 Ala. 602, 15 So. 141; *German v. Browne*, 137 Ala. 429, 34 So. 985; *Fuller v. Clemmons*, 158 Ala. 340, 48 So. 101.

*Arkansas*.—*Gist v. Hanly*, 33 Ark. 233; *Lane v. Hallum*, 38 Ark. 385; *Hershy v. Duval*, 47 Ark. 86, 14 S. W. 469; *Greenlee v. Rowland*, 85 Ark. 101, 107 S. W. 193; *Osborne v. Waters*, 92 Ark. 388, 123 S. W. 374.

*Colorado*.—*Fillmore v. Wells*, 10 Colo. 228, 15 Pac. 343, 3 Am. St. Rep. 567.

*District of Columbia*.—*Bendheim v. Pickford*, 31 App. Cas. 488.

*Georgia*.—*Morrison v. Ponder*, 45 Ga. 167.

*Indiana*.—*Koons v. Beach*, 147 Ind. 137, 45 N. E. 601, 46 N. E. 587.

*Iowa*.—See *Brown v. Morgan*, 163 Fed. 395 (construing Iowa statute).

*Michigan*.—*Kilbourne v. Wiley*, 124 Mich. 370, 83 N. W. 99.

*Minnesota*.—*Farmer v. Stillwater Water Co.*, 108 Minn. 41, 121 N. W. 418.

*Missouri*.—*Wait v. Atchison*, T. & S. F. R. Co., 204 Mo. 491, 103 S. W. 60; *Smoot v. Shy*, 159 Mo. App. 126, 139 S. W. 239.

*Montana*.—*Coombe v. Knox*, 28 Mont. 202, 72 Pac. 641.

*New Jersey*.—See *Black v. Black*, 32 N. J. Eq. 74. Compare *Weller v. Jersey City, H. & P. St. R. Co.*, 66 N. J. Eq. 11, 57 Atl. 730, *affirmed* 68 N. J. Eq. 659, 6 Ann. Cas. 442, 61 Atl. 459.

*New York*.—*Kenney v. Apgar*, 93 N. Y. 539; *Goodrich v. McDonald*, 112 N. Y. 157, 19 N. E. 649; *Deering v. Schreyer*, 171 N. Y. 451, 64 N. E. 179, *reversing* 58 App. Div. 322, 68 N. Y. S. 1015; *Fischer-Hansen v. Brooklyn Heights R. Co.*, 173 N. Y. 492, 66 N. E. 395, *reversing* 63 App. Div. 356, 71 N. Y. S. 513; *In re Pieris*, 176 N. Y. 566, 68 N. E. 1123, *affirming* 82 App. Div. 466, 81 N. Y. S. 927; *In re Lexington Ave.*, 30 App.

that the statutory remedy does not exclude the right to bring an equitable action for the enforcement of an attorney's lien.<sup>1</sup> The trial follows the usual course of trials in equity, the hearing being had before the chancellor. The granting of a jury trial is discretionary with the court, unless it is otherwise provided by statute.<sup>2</sup>

§ 678. *Parties.*—A suit for the enforcement of an attorney's lien may be brought by the attorney, or his assignee;<sup>3</sup> and against the adverse party, or the client, or both;<sup>4</sup> and in some jurisdictions the lien may be enforced against third parties into whose hands the subject-matter of the litigation may come.<sup>5</sup> So, the lien may be enforced as against sureties.<sup>6</sup> But where certain heirs assigned an interest in their share of an estate to another heir, with the understanding that such assignee should employ counsel for certain purposes, and that the property transferred should be

Div. 602, 27 Civ. Proc. 245, 52 N. Y. S. 203, *affirmed* 157 N. Y. 678, 51 N. E. 1092; *Roehfort v. Metropolitan St. R. Co.*, 50 App. Div. 261, 30 Civ. Proc. 285, 63 N. Y. S. 1036; *Mathot v. Triebel*, 98 App. Div. 328, 90 N. Y. S. 903; *Kuehn v. Syracuse Rapid Transit R. Co.*, 104 App. Div. 580, 93 N. Y. S. 883; *Ransom v. Cutting*, 112 App. Div. 150, 98 N. Y. S. 282, *affirmed* 188 N. Y. 447, 81 N. E. 324; *Dolliver v. American Swan Boat Co.*, 32 Misc. 264, 65 N. Y. S. 978; *Kennedy v. Steele*, 35 Misc. 105, 71 N. Y. S. 237; *Skinner v. Busse*, 38 Misc. 265, 77 N. Y. S. 560; *Cohn v. Polstein*, 41 Misc. 431, 84 N. Y. S. 1072; *Oliwill v. Verdenhalven*, 17 Civ. Proc. 362, 7 N. Y. S. 99; *Fox v. Fox*, 24 How. Pr. 109.

*Ohio.*—*Pennsylvania Co. v. Thatcher*, 78 Ohio St. 175, 85 N. E. 55.

*Oregon.*—*Alexander v. Munroe*, 54 Ore. 500, 101 Pac. 903, 103 Pac. 514, 135 Am. St. Rep. 849.

*Tennessee.*—*McCamy v. Key*, 3 Lea 247; *Covington v. Bass*, 88 Tenn. 496, 12 S. W. 1033; *Payne v. Payne*, 106 Tenn. 467, 61 S. W. 767; *Brown v. Bigley*, 3 Tenn. Ch. 618.

<sup>1</sup> *Fischer-Hansen v. Brooklyn Heights R. Co.*, 173 N. Y. 492, 66 N. E. 395, *reversing* 63 App. Div. 356, 71 N. Y. S. 513. Where an attorney's right to a lien is clear, he may enforce it by suit in equity, and is not limited to an application to the court by petition. *Morey v. Schuster*, 81 Misc. 515, 142 N. Y. S. 1054.

<sup>2</sup> *Sweeley v. Sieman*, 123 Ia. 183, 98 N. W. 571; *Jamison v. Ranck*, 140 Ia. 635, 119 N. W. 76; *Weicher v. Cargill*, 86 Minn. 271, 90 N. W. 402.

<sup>3</sup> See *supra*, § 656.

<sup>4</sup> See *supra*, § 657. And see also *Oishei v. Metropolitan St. R. Co.*, 110 App. Div. 709, 35 Civ. Proc. 240, 97 N. Y. S. 417.

<sup>5</sup> See *supra*, §§ 618, 626.

<sup>6</sup> See *infra*, § 683.

payment in full for any liability which the assignee might incur, it was held that the assignors were neither necessary nor proper parties to a suit to enforce an attorney's lien for services rendered to their assignee.<sup>7</sup> And it has also been held that a husband is not a necessary party in a suit to establish a lien on funds paid by him to the clerk of the court to satisfy a money judgment in an action for divorce.<sup>8</sup>

§ 679. **Pleading and Proof.** — In a suit for the establishment of an attorney's lien, it is essential that the complaint or bill should show every fact upon which the claim is predicated; thus, it is usual to set forth the employment of the attorney, the performance of the duties undertaken by him or some sufficient excuse for nonperformance, the accrual of a lien, the amount thereof, and the fact that it remains unpaid.<sup>9</sup> But the amount due need not be definitely fixed in all cases, and this is necessarily so where no amount has been agreed upon by the parties, and the recovery is, therefore, confined to reasonable compensation for the services rendered.<sup>10</sup> The pleading should also show notice of the lien, and compliance with statutory requirements in this respect.<sup>11</sup> It has been held that several liens may be consolidated in one suit, although the better practice, it seems, is to bring separate suits for the enforcement of each lien.<sup>12</sup> An attorney's lien on a decree may be enforced by a petition to the chancellor, instead of an

<sup>7</sup> *Ingersoll v. Coram*, 127 Fed. 418.

<sup>8</sup> *Hubbard v. Ellithorpe*, 135 Ia. 259, 112 N. W. 796, 124 Am. St. Rep. 271.

<sup>9</sup> *Alabama*.—*Weaver v. Cooper*, 73 Ala. 318.

*Arkansas*.—*Rachels v. Doniphan Lumber Co.*, 98 Ark. 529, 136 S. W. 658.

*Colorado*.—*Flint v. Hubbard*, 16 Colo. App. 464, 66 Pac. 446.

*Georgia*.—*Davis v. Jackson*, 86 Ga. 138, 12 S. E. 299.

*Indiana*.—*Dunning v. Galloway*, 47 Ind. 182; *Day v. Bowman*, 109 Ind. 383, 10 N. E. 126.

*Minnesota*.—*Wetherby v. Weaver*, 51 Minn. 73, 52 N. W. 970.

*Montana*.—*Coombe v. Knox*, 28 Mont. 202, 72 Pac. 641.

*Oregon*.—*Jackson v. Stearns*, 48 Ore. 25, 84 Pac. 798, 5 L.R.A.(N.S.) 390.

<sup>10</sup> *Coombe v. Knox*, 28 Mont. 202, 72 Pac. 641.

<sup>11</sup> *Taylor v. St. Louis Merchants' Bridge Terminal R. Co.*, 207 Mo. 495, 105 S. W. 740. And see also *supra*, §§ 600-605, as to notice of lien generally.

<sup>12</sup> *Suwannee Turpentine Co. v. Baxter*, 109 Ga. 597, 35 S. E. 142.

original bill.<sup>13</sup> In a suit against an assessment insurance association to enforce an attorney's lien for services rendered in procuring a judgment on an insurance certificate, it was held that the petition should allege that the funds on which a lien was claimed were the proceeds of an assessment made on account of the death of the person named in the certificate, or that the surplus fund of the company was sufficient to pay the claim.<sup>14</sup> The pleading in actions for compensation generally has been considered heretofore.<sup>15</sup>

The burden of proof rests with the attorney;<sup>16</sup> but where a settlement has been effected, it has been held that he need not show that his client had a meritorious cause.<sup>17</sup> Evidence in actions for compensation generally has been discussed in that connection.<sup>18</sup>

**§ 680. Defenses.**— The defendant may set up and prove, in bar of the action, any fact which has a tendency to rebut the plaintiff's claim; thus, it may be shown that no lien has accrued,<sup>19</sup> or that, if one did accrue, it has been waived or lost,<sup>20</sup> or was provided for in making the settlement.<sup>1</sup> So, it may be shown in defense that the attorney was not authorized to appear in the litigation wherein it is alleged that the lien accrued,<sup>2</sup> or that the

<sup>13</sup> *Fuller v. Clemmons*, 158 Ala. 340, 48 So. 101.

<sup>14</sup> *Hentig v. Benevolent Ass'n*, 45 Kan. 462, 25 Pac. 878.

<sup>15</sup> See *supra*, §§ 494-499.

<sup>16</sup> *Wolf v. United Rys. Co.*, 155 Mo. App. 125, 133 S. W. 1172.

<sup>17</sup> *Barthell v. Chicago, M. & St. P. R. Co.*, 138 Ia. 688, 116 N. W. 813; *Yonge v. St. Louis Transit Co.*, 109 Mo. App. 235, 84 S. W. 184. Compare the cases cited *supra*, note 9.

<sup>18</sup> See *supra*, §§ 501-550.

<sup>19</sup> *United States v. O'Flaherty v. Hamburg-American Packet Co.*, 168 Fed. 411.

*Alabama*.—*McCa v. Grant*, 43 Ala. 262.

*Georgia*.—*Brown v. Georgia, C. & N. R. Co.*, 101 Ga. 80, 28 S. E. 634.

*Nebraska*.—*Phillips v. Hogue*, 63 Neb. 192, 88 N. W. 180.

*New York*.—*Crossman v. Smith*, 116 App. Div. 791, 102 N. Y. S. 18; *Knickerbocker Inv. Co. v. Voorhees*, 128 App. Div. 639, 112 N. Y. S. 842.

<sup>20</sup> *Hall v. Lockerman*, 127 Ga. 537, 56 S. E. 759; *Fischer-Hansen v. Brooklyn Heights R. Co.*, 173 N. Y. 492, 66 N. E. 395. See also *Loofbourov v. Hicks*, 24 Utah 49, 66 Pac. 602, 55 L.R.A. 874.

<sup>1</sup> *Lee v. Vacuum Oil Co.*, 126 N. Y. 579, 670, 27 N. E. 1018, 1020.

<sup>2</sup> *Kelly v. New York City R. Co.*, 122 App. Div. 467, 106 N. Y. S. 894; *Herman v. New York City R. Co.*, 122 App. Div. 469, 106 N. Y. S. 896; *Guliano v. Whitenack*, 9 Misc. 562, 24 Civ. Proc. 55, 30 N. Y. S. 415.

client is solvent,<sup>3</sup> or that the attorney acted under a void contract.<sup>4</sup> But it has been held that the fact that the services were rendered in different courts cannot be set up in defense.<sup>5</sup> The previous discussion of defenses to actions for compensation generally should be consulted in this connection.<sup>6</sup>

**§ 681. Recovery and Enforcement Thereof.** — The amount of the recovery must, of course, depend upon the circumstances.<sup>7</sup> In a previous chapter consideration has been given to the amount of compensation to which an attorney is entitled, together with the various matters which affect the same.<sup>8</sup> When judgment has been entered it may be enforced in accordance with the local practice. It has been held that the judgment need not provide that execution shall first issue against the client, and this is especially true where it appears that the client is financially irresponsible, or is without the jurisdiction.<sup>9</sup>

<sup>3</sup> *Young v. Howell*, 64 App. Div. 246, 72 N. Y. S. 5; *Webb v. Parker*, 130 App. Div. 92, 114 N. Y. S. 489; *Mitchell v. Mitchell*, 143 App. Div. 172, 127 N. Y. S. 1065; *Butts v. Carey*, 143 App. Div. 356, 128 N. Y. S. 533; *McKay v. Morris*, 35 Misc. 571, 72 N. Y. S. 23; *Witmark v. Perley*, 43 Misc. 14, 86 N. Y. S. 756; *Gurley v. Gruenstein*, 44 Misc. 268, 89 N. Y. S. 887; *In re Goodale*, 58 Misc. 182, 108 N. Y. S. 949. *Compare* *Yonge v. St. Louis Transit Co.*, 109 Mo. App. 235, 84 S. W. 184.

<sup>4</sup> *Ingersoll v. Coal Creek Coal Co.*, 117 Tenn. 263, 10 Ann. Cas. 829, 98 S. W. 178, 119 Am. St. Rep. 1003, 9 L.R.A.(N.S.) 282.

<sup>5</sup> *Weaver v. Cooper*, 73 Ala. 318.

<sup>6</sup> See *supra*, §§ 551-564.

<sup>7</sup> *United States*.—*Herman v. Metropolitan St. R. Co.*, 121 Fed. 184.

*Iowa*.—*Parsons v. Hawley*, 92 Ia. 175, 60 N. W. 520.

*Kentucky*.—*Louisville & N. R. Co. v. Givens*, 13 Ky. L. Rep. 491.

*Missouri*.—*Stephens v. Metropolitan St. Ry. Co.*, 157 Mo. App. 656, 138 S. W. 904.

*Nebraska*.—*Griggs v. White*, 5 Neb. 467.

*New York*.—*In re Snyder*, 119 App. Div. 277, 104 N. Y. S. 571; *Baxter v. Connor*, 119 App. Div. 450, 104 N. Y. S. 327; *Albert Palmer Co. v. Van Orden*, 49 Super. Ct. 89, 4 Civ. Proc. 44; *Oliwell v. Verdenhalven*, 17 Civ. Proc. 362, 7 N. Y. S. 99; *Hall v. Ayer*, 19 How. Pr. 91, 9 Abb. Pr. 220.

<sup>8</sup> See *supra*, §§ 439-486, 566. As to the recovery of interest, see *supra*, § 567.

<sup>9</sup> *Oishei v. Pennsylvania R. Co.*, 117 App. Div. 110, 119, 102 N. Y. S. 368, 374, *affirmed* 191 N. Y. 544, 85 N. E. 1113.

§ 682. **Enforcement against Judgment.** — Where a lien has attached to a judgment or decree,<sup>10</sup> it may be enforced against the same.<sup>11</sup> And in some jurisdictions it is held that an action may be maintained on the judgment by the attorney for the purpose of enforcing his lien;<sup>12</sup> it has been held, however, that an attorney cannot maintain such an action without his client's consent.<sup>13</sup>

§ 683. **Enforcement against Provisional Remedies and Sureties.** — It has been held that an attorney's lien extends to, and may be enforced against, all provisional remedies or securities given in the action after its commencement,<sup>14</sup> and also to all suits arising from the original action and incidental to its enforcement.<sup>15</sup> Thus, a lien may be enforced against the surety on a bail bond, especially one which has been assigned to the attorney,<sup>16</sup> or against a replevin bond,<sup>17</sup> or against the sureties on an appeal bond.<sup>18</sup> So, it has been held that an attorney may prosecute an action against an officer for taking an insufficient bond in a replevin suit.<sup>19</sup>

### *Enforcement of Retaining Lien.*

§ 684. **Generally.** — An attorney's retaining lien, as stated heretofore, is merely a right to retain in his possession certain property of the client until his compensation has been paid.<sup>20</sup> It

<sup>10</sup> See *supra*, §§ 634-637.

<sup>11</sup> *Tarver v. Tarver*, 53 Ga. 43; *Curtis v. Metropolitan St. R. Co.*, 118 Mo. App. 341, 94 S. W. 762.

<sup>12</sup> *Stone v. Hyde*, 22 Me. 318; *Woods v. Verry*, 4 Gray (Mass.) 357; *Kipp v. Rapp*, 7 Civ. Proc. (N. Y.) 316.

<sup>13</sup> *Horton v. Champlin*, 12 R. I. 550, 34 Am. Rep. 722.

<sup>14</sup> *Kipp v. Rapp*, 7 Civ. Proc. (N. Y.) 316; *Crouch v. Hoyt*, 24 Civ. Proc. 60, 30 N. Y. S. 406. Compare *Cornell v. Donovan*, 14 Daly 292, 12 N. Y. St. Rep. 117.

<sup>15</sup> *Newbert v. Cunningham*, 50 Me. 231, 79 Am. Dec. 612. And see also *supra*, § 595.

<sup>16</sup> *Newberg v. Schwab*, 49 Super Ct. (N. Y.) 232; *Shackleton v. Hart*, 20 How. Pr. (N. Y.) 39; *Campbell v. Grove*, 2 Johns. Cas. (N. Y.) 105.

<sup>17</sup> *Newbert v. Cunningham*, 50 Me. 231, 79 Am. Dec. 612.

<sup>18</sup> *Johnson v. McMillan*, 13 Colo. 423, 22 Pac. 769; *Coombe v. Knox*, 28 Mont. 202, 72 Pac. 641. See also *Kuickerbocker Inv. Co. v. Voorhees*, 128 App. Div. 639, 112 N. Y. S. 842.

<sup>19</sup> *Newbert v. Cunningham*, 50 Me. 231, 79 Am. Dec. 612.

<sup>20</sup> See *supra*, §§ 573-577, 599, 638, 639. *Cones v. Brooks*, 60 Neb. 698, 84 N. W. 85.

cannot be actively enforced;<sup>1</sup> but it may be determined and enforced by the court on the application of one who is interested therein,<sup>2</sup> or in an action by the attorney for compensation.<sup>3</sup> It has been held, however, that a surrogate's court has no jurisdiction to enforce this lien.<sup>4</sup> The absolute right which, under the New York judiciary law, an attorney, having money in his hands belonging to his client, has to a summary determination by the court of the existence and amount of his lien, is not dependent on his showing that he had preserved the money intact; but it is enough if he is ready, able, and willing to account to the client.<sup>5</sup>

<sup>1</sup> *England*.—Heslop *v.* Metcalfe, 3 Myl. & C. 183; Bozon *v.* Bolland, 4 Myl. & C. 354, 358; Colegrave *v.* Manley, T. & R. 400; West of England Bank *v.* Batchelor, 51 L. J. Ch. 199.

*United States*.—McPherson *v.* Cox, 96 U. S. 404, 24 U. S. (L. ed.) 746; In re Wilson, 12 Fed. 235, 26 Alb. L. J. 271.

*Alabama*.—Tillman *v.* Reynolds, 48 Ala. 365.

*Iowa*.—Foss *v.* Cobler, 105 Ia. 728, 75 N. W. 516.

*Nebraska*.—Cones *v.* Brooks, 60 Neb. 698, 84 N. W. 85.

*New York*.—In re Klein, 101 N. Y. S. 663.

*Tennessee*.—Brown *v.* Bigley, 3 Tenn. Ch. 621; McDonald *v.* Charleston, C. & C. R. Co., 93 Tenn. 281, 24 S. W. 252.

*Texas*.—Thomson *v.* Findlater Hardware Co., 156 S. W. 301.

*Washington*.—Gottstein *v.* Harrington, 25 Wash. 508, 65 Pac. 753.

*Proceedings by Client to Question Lien*.—The right to entertain a summary proceeding to compel the return of books and papers held by an attor-

ney under a claim of a lien for services depends on the relationship of attorney and client; and where a petition for such an order negatives the employment of the respondent as the attorney of the petitioner, there is no right shown to maintain the proceeding. In re Niagara, L. & O. Power Co., 203 N. Y. 493, Ann. Cas. 1913B 234, 97 N. E. 33, 38 L.R.A.(N.S.) 207.

<sup>2</sup> *United States*.—Leszynsky *v.* Merritt, 9 Fed. 688; Davis *v.* Davis, 90 Fed. 791.

*Alaska*.—Nodine *v.* Hannum, 1 Alaska 302.

*New York*.—Greenfield *v.* New York, 28 Hun 320; Prentiss *v.* Livingston, 66 How. Pr. 380; In re H ———, 87 N. Y. 521, 63 How. Pr. 152; In re Edward Ney Co., 114 App. Div. 467, 99 N. Y. S. 982; Matter of Stenton, 55 Misc. 515, 105 N. Y. S. 295.

<sup>3</sup> Leszynsky *v.* Merritt, 9 Fed. 688.

<sup>4</sup> In re Robinson's Estate, 59 Misc. 323, 112 N. Y. S. 280.

<sup>5</sup> Consol. Laws 1909, c. 30, § 475. In re Farrington, 146 App. Div. 590, 131 N. Y. S. 312.

## CHAPTER XXVII.

### PROSECUTING ATTORNEYS.

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*In General.*

§ 685. **Prosecuting Officers in England.** — The prosecution of offenses in England is conducted under the supervision of the director of public prosecutions, who is appointed by the secretary of state. The appointee must be a barrister or solicitor of at least ten years' standing, and an assistant director must be a barrister or solicitor of at least seven years' standing.<sup>1</sup> It is the duty of the director of public prosecutions, under the supervision of the attorney-general, to undertake and carry on criminal proceedings generally, and to advise the officials who are concerned therein.<sup>2</sup> The attorney-general also exercises certain functions in relation to criminal prosecutions, particularly those concerning the House of Lords and the House of Commons.<sup>3</sup> The rights of private prosecutors, however, are not affected in England, and anyone may institute and carry on a prosecution; but the director of public prosecutions may undertake the conduct of the proceeding at any stage, should he desire to do so.<sup>4</sup>

§ 686. **Prosecuting Officers in United States.** — Criminal prosecutions in the United States are carried on in the name of the government, and conducted, in most jurisdictions at least, by

<sup>1</sup> 7 Halsbury's Laws of England,  
p. 78.

<sup>3</sup> See *infra*, § 720.

<sup>2</sup> 9 Halsbury's Laws of England,  
p. 292.

<sup>4</sup> Alexander's Adm. of Justice,

pp. 131, 132.

counsel who are elected by the people, or duly appointed by constituted authority, for that purpose. The prosecuting attorney, in this country, is frequently designated and spoken of as the "district attorney," and in some instances he is known as the "county attorney." But, irrespective of the particular title by which he may be known in the various communities, he is an officer set apart to conduct the public business,<sup>5</sup> usually of a criminal nature,<sup>6</sup> although in some instances certain duties of a civil character may be imposed upon him.<sup>7</sup> Of course, the legislature has the power to provide for the commencement of criminal prosecutions by officers other than state's attorneys.<sup>8</sup>

**§ 687. Prosecuting Attorneys as Officers.** — A prosecuting attorney, notwithstanding his official position, still remains an officer of the court as an attorney at law, and, as such, is amenable to the authority of the court over attorneys generally, irrespective of whether or not they occupy official positions.<sup>9</sup> In his official capacity a prosecuting attorney is a public officer because he represents the sovereign power of the government in whose name, and by whose authority, he acts.<sup>10</sup> Thus, it has been held that a federal district attorney is the regular officer of the government, and has charge of all its legal proceedings within his district, subject only to the general direction and supervision of the attorney general.<sup>11</sup> Under the constitution and laws of several of the states a district attorney is deemed to be a state officer, for the reason that his duties are of a public and general nature, in which the state is

<sup>5</sup> *Colorado*.—*People v. Gibson*, 53 Colo. 231, 125 Pac. 531.

*Indiana*.—*State v. Morrison*, 64 Ind. 141. See also *Dodd v. Sweetser*, 14 Ind. 292; *State v. Tucker*, 46 Ind. 355.

*Michigan*.—*People v. May*, 3 Mich. 598.

*Nevada*.—*State v. Salge*, 2 Nev. 321.

*Washington*.—*Spokane County v. Allen*, 9 Wash. 229, 37 Pac. 428, 43 Am. St. Rep. 830.

<sup>6</sup> See *infra*, § 706.

<sup>7</sup> The local statutes must be consulted in this respect.

<sup>8</sup> *In re Snell*, 58 Vt. 207, 1 Atl. 566.

<sup>9</sup> See *State v. Henning*, 33 Ind. 189.

<sup>10</sup> *Fleming v. Hance*, 153 Cal. 162, 94 Pac. 620.

<sup>11</sup> *San Francisco v. U. S.*, 4 Sawy. 553, 21 Fed. Cas. No. 12,316. But see *Fifth Nat. Bank v. Long*, 7 Biss. 502, 9 Fed. Cas. No. 4,780, wherein it was held that the district attorney is not so far an officer of the federal circuit court that he may be compelled to enter an appearance for the United States.

interested.<sup>12</sup> In other states he is deemed to be a county officer; <sup>13</sup> thus, it has been held in Pennsylvania that the district attorney must be provided with a suitable room for his office in the county building free of charge, and that the commissioners of any county can be compelled to provide such room.<sup>14</sup> It is evident, of course, that a prosecuting attorney may be both a state and county officer for certain purposes; matters of this character, however, can only be satisfactorily determined from an examination of the local laws.

**§ 688. As Quasi Judicial Officers.** — It is generally conceded that a prosecuting attorney is a quasi-judicial officer,<sup>15</sup> and that, as such, he must act impartially, as well in refraining from prosecuting as in prosecuting. He must guard the interests of public justice in behalf of all concerned, and he must not become entangled with private interests or grievances in any way connected with the prosecutions which he may conduct.<sup>16</sup>

*Election or Appointment, Eligibility, Tenure and Qualification.*

**§ 689. Election or Appointment.** — The office of prosecuting attorney is created by legislation,<sup>17</sup> and the incumbent thereof is usually elected by the people in the manner provided for the election of other officers who are so chosen.<sup>18</sup> In some jurisdictions,

<sup>12</sup> Griffin v. Rhoton, 85 Ark. 89, 107 S. W. 380; State v. Romero, (N. M.) 125 Pac. 617.

<sup>13</sup> State v. Kovolosky, 92 Ia. 498, 61 N. W. 223; Clark v. Tracy, 95 Ia. 410, 64 N. W. 290; Graham v. Stein, 4 Ohio Cir. Dec. 140, 18 Ohio Cir. Ct. 770.

<sup>14</sup> Nothstein v. Carbon County, 17 Pa. Co. Ct. 206, 5 Pa. Dist. Ct. 69 (construing Act Apr. 15, 1834, and Art. 14, § 1, of the constitution).

<sup>15</sup> Arkansas.—Holder v. State, 58 Ark. 473, 25 S. W. 279.

Indiana.—State v. Henning, 33 Ind. 189.

Michigan.—People v. Bemis, 51 Mich. 422, 16 N. W. 794.

New Mexico.—State v. Romero, 125 Pac. 617.

Pennsylvania.—Com. v. Bubnis, 197 Pa. St. 542, 47 Atl. 748.

<sup>16</sup> See *infra*, §§ 705, 712.

<sup>17</sup> Ex p. Lusk, 82 Ala. 519, 2 So. 140; State v. Butler, 105 Me. 91, 18 Ann. Cas. 484, 73 Atl. 560, 24 L.R.A. (N.S.) 744.

<sup>18</sup> Ex p. Lusk, 82 Ala. 519, 2 So. 140; People v. Brown, 16 Cal. 441; State v. Saline County, 60 Neb. 275, 83 N. W. 70; State v. Beal, 60 Ohio St. 208, 54 N. E. 84.

and for certain purposes, it is provided that a prosecuting officer may be appointed by a particular court,<sup>19</sup> or by the attorney general,<sup>20</sup> or by the governor of the state;<sup>1</sup> and the legislature usually provides for the filling of offices created by the establishment or division of judicial districts.<sup>2</sup> Thus, it is provided that federal "district attorneys shall be appointed for a term of four years, and their commissions shall cease and expire at the expiration of four years from their respective dates."<sup>3</sup> It is not doubted, of course, that the court may appoint an attorney to prosecute a criminal case which is pending before it even in the absence of statute,<sup>4</sup> as, for instance, it does for the defense of indigent prisoners;<sup>5</sup> but where a statutory method of election or appointment is prescribed, that course must be pursued.<sup>6</sup> The appointment of deputies, assistants, or substitutes, will be considered later.<sup>7</sup>

**§ 690. Appointment to Fill Vacancy.**—The filling of vacancies in the office of prosecuting attorney is usually provided for by legislation.<sup>8</sup> As a general rule, the court is empowered to fill such vacancies;<sup>9</sup> but in many instances it is provided that a va-

<sup>19</sup> See *State v. Gilbert*, 163 Mo. App. 679, 147 S. W. 505; *People v. Albany Common Pleas*, 19 Wend. (N. Y.) 27.

<sup>20</sup> *State v. Nield*, 4 Kan. App. 626, 45 Pac. 623; *Com. v. Havrilla*, 38 Pa. Super. Ct. 292.

<sup>1</sup> *State v. Butler*, 105 Me. 91, 18 Ann. Cas. 484, 73 Atl. 560, 24 L.R.A. (N.S.) 744.

<sup>2</sup> *Colorado*.—*People v. Annis*, 10 Colo. 53, 14 Pac. 52.

*Indiana*.—*State v. Peterson*, 74 Ind. 174; *Elam v. State*, 75 Ind. 518.

*Kansas*.—*State v. Meek*, 86 Kan. 576, 120 Pac. 555.

*Kentucky*.—*Adams v. Roberts*, 119 Ky. 364, 83 S. W. 1035, 26 Ky. L. Rep. 1271; *Watkins v. Snyder*, 148 Ky. 733, 147 S. W. 899; *McCreary v. Fields*, 148 Ky. 730, 147 S. W. 901.

*North Carolina*.—*McCall v. Gardner*, 125 N. C. 238, 31 S. E. 434.

<sup>3</sup> U. S. Rev. Stat., § 769 (4 Fed. Stat. Annot. 71).

<sup>4</sup> *Tesh v. Com.*, 4 Dana (Ky.) 522.

<sup>5</sup> See *supra*, § 87.

<sup>6</sup> *Sayles v. Genesee Circuit Judge*, 82 Mich. 84, 46 N. W. 29.

<sup>7</sup> See *infra*, §§ 695-704.

<sup>8</sup> *State v. Saline County*, 60 Neb. 275, 83 N. W. 70.

<sup>9</sup> *United States*.—U. S. Rev. Stat., § 793 (4 Fed. Stat. Annot. 72). See also *In re Farrow*, 3 Fed. 112, 4 Woods 491.

*Kansas*.—*State v. Mechem*, 31 Kan. 435, 2 Pac. 816; *State v. Meek*, 86 Kan. 576, 120 Pac. 555.

*Massachusetts*.—*Com. v. King*, 8 Gray 501.

*Ohio*.—*In re Prosecuting Attorney*, 2 Ohio Dec. (Reprint) 602, 2 West. L. Month. 147.

cancy in the office of prosecuting attorney may be filled by the county authorities,<sup>10</sup> or by the governor,<sup>11</sup> and in some instances the governor can only make such appointment with the consent of the legislature.<sup>12</sup>

The word "vacancy," as applied to an office, has no technical meaning. An office is not vacant so long as it is supplied in the manner provided by law with an incumbent who is legally qualified to exercise the power and perform the duties which pertain to it; and, conversely, it is vacant in the eye of the law whenever it is unoccupied by a legally qualified incumbent, who has a lawful right to continue therein until the happening of some future event.<sup>13</sup> A vacancy will be deemed to have occurred where the prosecuting officer is unable, or neglects, or refuses to perform his duties, or where it is improper for him to act;<sup>14</sup> but a vacancy does not occur merely because the prosecuting officer is absent from the district;<sup>15</sup> and where a prosecuting officer has the legal right to hold over until his successor has been elected, and he does so hold over, the office is not vacant.<sup>16</sup>

§ 691. **Eligibility.** — As the title of the office implies, a prosecuting attorney must be a lawyer, duly licensed and admitted to practice,<sup>17</sup> and in good standing; one who has been disbarred may not hold the office.<sup>18</sup> Under a constitutional provision to the ef-

*Pennsylvania.*—Com. v. McHale, 97 Pa. St. 397, 39 Am. Rep. 808.

<sup>10</sup> People v. Brown, 16 Cal. 441; State v. Walker, 30 Neb. 501, 46 N. W. 648; State v. Rankin, 33 Neb. 266, 49 N. W. 1121; State v. Whitney, 9 Wash. 377, 37 Pac. 473.

<sup>11</sup> Simonton v. State, 44 Fla. 289, 31 So. 821; Walsh v. Knickerbocker, 18 La. Ann. 180; State v. Garrett, 29 La. Ann. 637; State v. Barrow, 30 La. Ann. 657; State v. Davis, 44 Mo. 129.

<sup>12</sup> Territory v. Mann, 16 N. M. 744, 120 Pac. 313.

<sup>13</sup> Territory v. Mann, 16 N. M. 744, 120 Pac. 313.

<sup>14</sup> Com. v. McHale, 97 Pa. St. 397, 39 Am. Rep. 808.

<sup>15</sup> Kouns v. Draper, 43 Mo. 225.

<sup>16</sup> Territory v. Mann, 16 N. M. 744, 120 Pac. 313.

<sup>17</sup> People v. Hallett, 1 Colo. 352; Hanson v. Grattan, 84 Kan. 843, 115 Pac. 646, 34 L.R.A.(N.S.) 240; People v. May, 3 Mich. 598; State v. Russell, 83 Wis. 330, 53 N. W. 441. A woman who was duly admitted to the bar has been held to be ineligible to the office of prosecuting attorney on the ground that she was not an elector. Atty.-Gen. v. Abbott, 121 Mich. 540, 80 N. W. 372, 47 L.R.A. 92.

<sup>18</sup> Brown v. Woods, 2 Okla. 601, 39 Pac. 473; Danforth v. Egan, 23 S. D. 43, 20 Ann. Cas. 418, 119 N. W. 1021, 139 Am. St. Rep. 1030.

fect that a prosecuting officer must be learned in the law, it has been held that one admitted to practice in a sister state may show that fact as proof of his qualification.<sup>19</sup> So, it is usually provided that a prosecuting attorney must reside in the district which he is to serve.<sup>20</sup> It would seem, however, that the fact that a prosecuting attorney was an unlicensed person, or a nonresident of the district, would not invalidate his official acts while occupying the office.<sup>1</sup>

**§ 692. Qualification Generally.** — After he has been elected, it is incumbent upon the prosecuting officer, as, indeed, it is in the case of many other officers, to comply with all requirements which are necessary to qualify him for the office; these, as a rule, are the filing of his certificate of election,<sup>2</sup> and the taking of an oath of office.<sup>3</sup> In some jurisdictions prosecuting attorneys are required to file a bond;<sup>4</sup> but a mere irregularity in the filing or approval of a bond is not fatal, especially where it appears that the prosecuting attorney had entered upon and performed his duties without objection for a considerable time.<sup>5</sup>

**§ 693. Qualification as to Trial of Particular Cause.** — A prosecuting attorney may be disqualified as to a particular case for various reasons; thus, such disqualification may result from the fact of his personal interest therein,<sup>6</sup> or because of his relation

<sup>19</sup> *Howard v. Burns*, 14 S. D. 383, 85 N. W. 920.

<sup>20</sup> *State v. Johnston*, 101 Ind. 223; *Territory v. Smith*, 3 Minn. 240, 74 Am. Dec. 749.

*In creating a new district*, the legislature must disturb existing districts; and when it cuts off a county in which a commonwealth's attorney resides, he must in a reasonable time change his residence, and take up a residence in the district which he is to serve, if he elects to continue as an officer thereof. *McCrear v. Fields*, 148 Ky. 730, 147 S. W. 901.

<sup>1</sup> *U. S. v. Mitchell*, 136 Fed. 896; *State v. Smith*, 50 Kan. 69, 31 Pac. 784.

<sup>2</sup> *State v. Colvig*, 15 Ore. 57, 13 Pac. 639.

<sup>3</sup> *U. S. Rev. Stat.*, § 769 (4 Fed. Stat. Annot. 71).

<sup>4</sup> *Glass v. Hutchinson*, 55 Kan. 162, 40 Pac. 287.

<sup>5</sup> *Howard v. Burns*, 14 S. D. 382, 85 N. W. 920.

<sup>6</sup> *People v. Landes*, 151 Ill. App. 181. But see *King v. State*, 43 Fla. 211, 31 So. 254, wherein it was held that a prosecuting attorney was not disqualified because he was also the re-

to the parties,<sup>7</sup> or because of a former employment by the accused, or, in some cases, by the prosecuting witness.<sup>8</sup> It has been held repeatedly that an attorney who has once been made the recipient of the confidence of a client concerning a certain subject-matter, is thereafter disqualified from acting for any other party adversely interested in such subject-matter;<sup>9</sup> and this applies to district attorneys as well as to other lawyers.<sup>10</sup> Nor is it necessary that the prosecuting attorney be guilty of an attempt to betray professional confidence; it is enough to disqualify him that he has placed himself in a position which leaves him open to such a charge.<sup>11</sup> Of course, disqualification may arise because of services rendered by the prosecuting attorney in a civil case as well as in another criminal case, providing, of course, that, because of such services, he gained a confidential knowledge of facts which are subsequently made the basis of a criminal prosecution against his former client;<sup>12</sup> but he will not be disqualified merely because of an unsuccessful effort to employ him.<sup>13</sup> In some states it is expressly provided that a prosecuting attorney who has represented a plaintiff in replevin, is disqualified from thereafter prosecuting the defendant in replevin for larceny on the same facts.<sup>14</sup> Statu-

tained counsel for private parties in a particular case which, as prosecutor, it became his duty to try. There was no improper conduct alleged in that case, however, nor was it charged that the state's attorney took any unfair or undue advantage of the defendant.

<sup>7</sup> *State v. Boasberg*, 124 La. 289, 50 So. 162; *People v. Cline*, 44 Mich. 290, 6 N. W. 671.

<sup>8</sup> *State v. Boasberg*, 124 La. 289, 50 So. 162; *State v. Sweeney*, 93 Mo. 38, 5 S. W. 614; *Dodd v. State*, 5 Okla. Crim. 513, 115 Pac. 632.

<sup>9</sup> See *supra*, §§ 174-182.

<sup>10</sup> *Gaulden v. State*, 11 Ga. 47; *State v. Roker*, 130 Ia. 239, 106 N. W. 645.

But a prosecuting officer is not prohibited from representing the plaintiff in an action for damages caused by an illegal sale of liquor merely because,

during his term of office, the defendant was indicted for a similar offense. *Bellison v. Apland*, 115 Ia. 599, 89 N. W. 22.

<sup>11</sup> *Roberts v. People*, 11 Colo. 213, 17 Pac. 637; *State v. Roker*, 130 Ia. 239, 106 N. W. 645.

<sup>12</sup> *State v. Roker*, 130 Ia. 239, 106 N. W. 645.

<sup>13</sup> *People v. Summers*, 115 Mich. 537, 73 N. W. 818, 4 Detroit Leg. N. 957.

<sup>14</sup> *People v. Hillhouse*, 80 Mich. 580, 45 N. W. 484.

But a district attorney who conducted proceedings before an examining magistrate against a person charged with having stolen certain wheat, and also appeared for the defense in an action of replevin brought by the accused against the officer who had seized the wheat, is not disquali-

tory grounds of disqualification are not, as a rule at least, exclusive, and the court may declare a prosecuting attorney disqualified with respect to a particular case, on grounds of public policy, for other good and sufficient reasons; <sup>15</sup> and if a district attorney finds that he cannot discharge the duties required of him as an officer in a particular case, and the court believes that his grounds are well founded, there is no good reason why he may not be represented by another. <sup>16</sup> The qualification of assistants to the district attorney will be considered later. <sup>17</sup>

§ 694. *Tenure.* — Under some old statutes it seems prosecuting attorneys were appointed during good behavior, <sup>18</sup> and at the pleasure of the court; <sup>19</sup> but at the present day the tenure of office of prosecuting attorneys, in nearly all instances, is fixed by both statutory <sup>20</sup> and constitutional provisions; <sup>1</sup> and while the legislature may regulate the office of prosecuting attorney, it cannot abolish it; <sup>2</sup> excepting, of course, where the constitution provides

fied from assisting a new district attorney upon a subsequent trial of the criminal action against said accused. *Jackson v. State*, 81 Wis. 127, 51 N. W. 89.

<sup>15</sup> *State v. Boasberg*, 124 La. 289, 50 So. 162.

<sup>16</sup> *State v. Boasberg*, 124 La. 289, 50 So. 162.

<sup>17</sup> See *infra*, § 699.

<sup>18</sup> *Bruce v. Fox*, 1 Dana (Ky.) 447.

<sup>19</sup> *Ex p. Bouldin*, 6 Leigh (Va.) 639.

<sup>20</sup> *Idaho*.—*Hays v. Hays*, 5 Idaho 154, 47 Pac. 732.

*Indiana*.—*Barkwell v. State*, 4 Ind. 179; *Hench v. State*, 72 Ind. 297; *Elam v. State*, 75 Ind. 518.

*Kansas*.—*Craft v. State*, 3 Kan. 450.

*Massachusetts*.—In re Opinion of Justices, 3 Gray 601.

*Missouri*.—*State v. Davis*, 44 Mo. 129.

*Nebraska*.—*State v. Saline County*, 60 Neb. 275, 83 N. W. 70.

*Nevada*.—*State v. Wells*, 8 Nev. 105.

*New York*.—*People v. Palmer*, 154 N. Y. 133, 47 N. E. 1084, *affirming* 21 App. Div. 101, 47 N. Y. S. 403.

*South Carolina*.—*State v. Jeter*, 1 McCord L. 234.

*Tennessee*.—*State v. Trewbitt*, 113 Tenn. 561, 82 S. W. 480.

*Texas*.—*Upshaw v. Booth*, 37 Tex. 125.

<sup>1</sup> *Cropsey v. Henderson*, 63 Ind. 268; *Moser v. Long*, 64 Ind. 189; *Fant v. Gibbs*, 54 Miss. 396; *Com. v. McHale*, 97 Pa. St. 397, 39 Am. Rep. 808; *State v. Trewbitt*, 113 Tenn. 561, 82 S. W. 480.

<sup>2</sup> *Indiana*.—*Moser v. Long*, 64 Ind. 189; *State v. Johnston*, 101 Ind. 223.

*Kentucky*.—*Adams v. Roberts*, 119 Ky. 364, 83 S. W. 1035, 26 Ky. L. Rep. 1271.

*Louisiana*.—*State v. Parlange*, 26 La. Ann. 548.

*Oregon*.—*State v. Walton*, 53 Ore.



otherwise.<sup>3</sup> Nor will the tenure of office be affected by a mistake or error in the commission.<sup>4</sup>

It has been held that U. S. Rev. Stat., § 769, which provides that "district attorneys shall be appointed for a term of four years, and their commissions shall cease and expire at the expiration of four years from their respective dates,"<sup>5</sup> is one of limitation, and not of grant, and under the settled construction of the Constitution the President has the power to remove an incumbent before the expiration of the term so limited.<sup>6</sup>

*Deputies, Substitutes and Assistants.*

**§ 695. Deputies.**—It is well settled that prosecuting attorneys may, and usually do, act by deputy.<sup>7</sup> The right to appoint deputies, however, is usually provided for by the legislature;<sup>8</sup> the power of appointment being given to the prosecuting attorney himself,<sup>9</sup> the attorney-general,<sup>10</sup> the governor,<sup>11</sup> certain county officers,<sup>12</sup>

557, 99 Pac. 431, *rehearing denied*, 53 Ore. 566, 101 Pac. 389, 102 Pac. 173.

*Pennsylvania*.—Com. v. Havrilla, 38 Pa. Super. Ct. 292.

<sup>3</sup> *The Oklahoma Constitution* creates the office of county attorney subject to change by the legislature, and it is held that the office, so created, may be abrogated, and its duties enlarged, diminished, or transferred, as the legislature may see fit. Childs v. State, 4 Okla. Crim. 474, 113 Pac. 545, 33 L.R.A.(N.S.) 563.

<sup>4</sup> Moser v. Long, 64 Ind. 189. See also Hench v. State, 72 Ind. 297.

<sup>5</sup> 4 Fed. Stat. Ann. 71.

<sup>6</sup> Parsons v. U. S., 167 U. S. 324, 17 S. Ct. 880, 42 U. S. (L. ed.) 185.

<sup>7</sup> Nesbit v. People, 19 Colo. 441, 36 Pac. 221; State v. Anderson, 29 La. Ann. 774; State v. Mack, 45 La. Ann. 1155, 14 So. 141; State v. Bezou, 48 La. Ann. 1369, 20 So. 892; State v. Britton, 131 La. 877, 60 So. 379; Par-

ker v. May, 5 Cush. (Mass.) 336; State v. Harris, 12 Nev. 414.

<sup>8</sup> Elliott v. Jackson County, 194 Mo. 532, 92 S. W. 480; Storey v. Murphy, 9 N. D. 115, 81 N. W. 23; State v. Walton, 53 Ore. 557, 99 Pac. 431, *rehearing denied* 53 Ore. 566, 101 Pac. 389, 102 Pac. 173; State v. Marshall County, 14 S. D. 149, 84 N. W. 775.

<sup>9</sup> McKay v. State, 90 Neb. 63, Ann. Cas. 1913B 1034, 132 N. W. 741, 39 L.R.A.(N.S.) 714; Mahaffey v. Territory, 11 Okla. 213, 66 Pac. 342.

<sup>10</sup> U. S. v. Twining, 132 Fed. 129; State v. Jepson, 76 Kan. 644, 92 Pac. 600; State v. Russell, 26 La. Ann. 68; State v. Boasberg, 124 La. 289, 50 So. 162.

<sup>11</sup> James v. Helm, 129 Ky. 323, 111 S. W. 335, 33 Ky. L. Rep. 871.

<sup>12</sup> *California*.—Freeman v. Barnum, 131 Cal. 386, 63 Pac. 691, 82 Am. St. Rep. 355.

*Colorado*.—McMullin v. Montrose County, 29 Colo. 478, 68 Pac. 779.

or to the court.<sup>13</sup> But the prosecuting attorney can appoint deputies only in the manner provided by law,<sup>14</sup> especially where it involves the delegation of his official discretion and responsibility.<sup>15</sup> Deputy and assistant prosecuting attorneys are frequently appointed for special purposes under legislative authority,<sup>16</sup> but usually they are provided for as assistants to the prosecuting attorney in the discharge of his various duties, and are clothed with the necessary powers and privileges for that purpose,<sup>17</sup> and their acts must be regarded as if done by the prosecuting attorney in person.<sup>18</sup> Thus, federal assistant district attorneys are deemed to be officers of the United States court for their respective districts.<sup>19</sup>

**§ 696. Substitutes.**—While prosecuting attorneys are the proper officers, within their respective districts, to prosecute criminals, courts and legislatures have long recognized the existence of conditions which prevent these officers from performing such duties in all cases, and the necessity of temporarily appointing a substitute to conduct such proceedings; therefore, authority exists in all jurisdictions whereby such substitutes may be appointed, and empowered to act, in the place and stead of the regularly constituted officers when, for any reason, they cannot act themselves, as, for instance, where they are absent, ill, or disqualified, or where they

*Iowa.*—*Tatlock v. Louisa County*, 46 Ia. 138.

*Michigan.*—*People v. Bemis*, 51 Mich. 422, 16 N. W. 794.

*North Dakota.*—*State v. Tough*, 12 N. D. 425, 96 N. W. 1025.

<sup>13</sup> See *infra*, §§ 696-698.

<sup>14</sup> *Tatlock v. Louisa County*, 46 Ia. 138; *Foster v. Clinton County*, 51 Ia. 541, 2 N. W. 207; *In re Gillespie*, 3 Verg. (Tenn.) 325.

Under Rev. Laws Okla. 1910, § 1563, authorizing county attorneys with the assent of the county commissioners to appoint assistants, not exceeding four in number, in counties having over 60,000 population, at specified salaries, an additional assistant appointed and paid by the county at-

torney himself is not a legally constituted assistant county attorney. *McGarrah v. State*, (Okla.) 133 Pac. 260.

<sup>15</sup> *Engle v. Chipman*, 51 Mich. 524, 16 N. W. 886; *McGarrah v. State*, (Okla.) 133 Pac. 260; *White v. State*, (Okla.) 133 Pac. 263.

<sup>16</sup> *Gray v. District Court of Ninth Judicial Dist.*, 42 Colo. 298, 94 Pac. 287; *In re Gilson*, 34 Kan. 641, 9 Pac. 763; *State v. Nield*, 4 Kan. App. 626, 45 Pac. 623.

<sup>17</sup> *People v. Magallones*, 15 Cal. 426; *Com. v. Grier*, 22 Pittsb. Leg. J. N. S. (Pa.) 243.

<sup>18</sup> *People v. Magallones*, 15 Cal. 426.

<sup>19</sup> *In re Leaken*, 127 Fed. 680.

refuse or neglect to perform their duties.<sup>20</sup> In most instances this power of substitution is regulated by statute, but it is well settled that, even in the absence of statute, such power is inherent in the court,<sup>1</sup> although where the matter is regulated by statute, substitution should only be made for a statutory reason.<sup>2</sup> The

<sup>20</sup> *Ex p. Digs*, 50 Ala. 78; *Joyner v. State*, 78 Ala. 448.

*California*.—*Toland v. Ventura County*, 135 Cal. 412, 67 Pac. 498.

*Colorado*.—*Roberts v. People*, 11 Colo. 213, 17 Pac. 637.

*Florida*.—*King v. State*, 43 Fla. 211, 31 So. 254.

*Georgia*.—*Mitchell v. State*, 22 Ga. 211, 68 Am. Dec. 493; *Horton v. State*, 11 Ga. App. 33, 74 S. E. 559.

*Iowa*.—*White v. Polk County*, 17 Ia. 413.

*Louisiana*.—*State v. Jerry*, 4 La. Ann. 190; *State v. Viaux*, 8 La. Ann. 514; *State v. Bass*, 12 La. Ann. 862; *State v. Boudreaux*, 14 La. Ann. 88; *State v. Johnson*, 41 La. Ann. 1076, 6 So. 802; *State v. Smith*, 107 La. 129, 31 So. 693, 1014; *State v. Britton*, 131 La. 877, 60 So. 379; *State v. Buhler*, 132 La. 1065, 62 So. 145.

*Minnesota*.—*State v. Borgstrom*, 69 Minn. 508, 72 N. W. 799, 975.

*Mississippi*.—*Keithler v. State*, 10 Smedes & M. 192.

*Missouri*.—*State v. Duncan*, 116 Mo. 288, 22 S. W. 699; *State v. Taylor*, 93 Mo. App. 327, 67 S. W. 672.

*Nebraska*.—*Gandy v. State*, 27 Neb. 707, 43 N. W. 747, 44 N. W. 108; *Korth v. State*, 46 Neb. 631, 65 N. W. 792; *Spaulding v. State*, 61 Neb. 289, 85 N. W. 80.

*New York*.—*People v. Lytle*, 7 App. Div. 553, 40 N. Y. S. 153.

*Ohio*.—*In re Prosecuting Attorney*, 2 Ohio Dec. (Reprint) 602, 4 West. L. Month, 147.

*Oklahoma*.—*Hyde v. Territory*, 8 Okla. 69, 56 Pac. 851.

*Pennsylvania*.—*Com. v. McHale*, 97 Pa. St. 397, 39 Am. Rep. 808.

*Tennessee*.—*Douglass v. State*, 6 Yerg. 525; *Wilson v. State*, 8 Yerg. 509.

*Texas*.—*State v. Johnson*, 12 Tex. 231; *Daniels v. State*, 77 S. W. 215.

*Wisconsin*.—*State v. Russell*, 83 Wis. 330, 53 N. W. 441.

<sup>1</sup> *King v. State*, 43 Fla. 211, 31 So. 254; *Horton v. State*, 11 Ga. App. 33, 74 S. E. 559; *State v. Moxley*, 102 Mo. 374, 14 S. W. 969, 15 S. W. 556; *State v. Duncan*, 116 Mo. 288, 22 S. W. 699.

<sup>2</sup> *California*.—*Toland v. Ventura County*, 135 Cal. 412, 67 Pac. 498.

*Idaho*.—*State v. Barber*, 13 Idaho 65, 88 Pac. 418.

*Kentucky*.—*Adams v. Com.*, 129 Ky. 255, 111 S. W. 348, 33 Ky. L. Rep. 779.

*Missouri*.—*State v. Seibert*, 130 Mo. 202, 32 S. W. 670.

*Oklahoma*.—*Mahaffey v. Territory*, 11 Okla. 213, 66 Pac. 342.

*Tennessee*.—*Pippin v. State*, 2 Sneed 43; *Douglass v. State*, 6 Yerg. 525; *Hiite v. State*, 9 Yerg. 198.

*Texas*.—*Harris County v. Stewart*, 91 Tex. 133, 41 S. W. 650.

*Compare* the cases cited *supra*, § 693, note 6, as to the disqualification of prosecuting attorneys in particular cases.

fact that a prosecuting officer cannot or will not perform the duties of his office, should not be permitted to suspend the prosecution of crime; and, were it otherwise, a failure of justice must necessarily result in many cases;<sup>3</sup> nor can one accused of crime object to being prosecuted by an unofficial member of the bar rather than by the prosecuting attorney.<sup>4</sup> In some jurisdictions the appointment of a special or substitute attorney is provided for where the prosecuting officer is guilty of misconduct, such as being in collusion with the accused,<sup>5</sup> or where he is involved in the crime to be investigated.<sup>6</sup> The power of appointing a substitute for the prosecuting attorney, however, is somewhat extraordinary, and will only be exercised where the need of it is apparent.<sup>7</sup> But when substitution has been made, the appointee is vested with all the powers of the regularly elected officer in whose place he has been appointed, unless the order of his appointment provides otherwise.<sup>8</sup>

### § 697. Right to Appoint Assistants for Trial Purposes. —

The people do not lose interest in the prosecution of criminals when they elect an officer whose duty it is to prosecute them; nor do they surrender their right to employ all just and proper means to see that the rights of the state are preserved; therefore, when the exigencies of a case demand it, as when the public prosecutor is inexperienced, or confronted by an array of able and talented counsel, who appear for the defendant in a difficult or complicated case, and the interests of the state demand that he have assistance,

<sup>3</sup> *Dukes v. State*, 11 Ind. 557, 71 Am. Dec. 370; *State v. Reid*, 113 La. 890, 37 So. 866.

<sup>4</sup> *State v. Bartlett*, 105 Me. 212, 74 Atl. 18, 134 Am. St. Rep. 542, 24 L.R.A. (N.S.) 564; *State v. Borgstrom*, 69 Minn. 508, 72 N. W. 799, 975.

<sup>5</sup> *State v. Smith*, 8 Ohio Dec. (Reprint) 136, 5 Cine. L. Bul. 881.

<sup>6</sup> *People v. District Ct.*, 29 Colo. 5, 66 Pac. 896.

<sup>7</sup> *Com. v. Dawson*, 3 Pa. Dist. Ct. 603.

In a proceeding to test the rights of a person appointed district attorney *pro tempore*, by the district court of Texas, under Pasch. Dig. art. 191, the state is not a proper party. *State v. Manlove*, 33 Tex. 798.

<sup>8</sup> *State v. Smith*, 107 La. 129, 31 So. 693, 1014; *State v. Daspit*, 129 La. 752, 56 So. 661; *State v. Tough*, 12 N. D. 425, 96 N. W. 1025; *Harris v. State*, 100 Tenn. 287, 45 S. W. 438; *Biemel v. State*, 71 Wis. 444, 37 N. W. 244.

such aid may be allowed.<sup>9</sup> Nor do statutes declaring who shall be charged with the duty of prosecuting persons charged with crime, exclude the power of the court to appoint counsel from members of the bar to assist in the prosecution.<sup>10</sup> Indeed, this is an inherent power of the court, and one which is frequently exercised; otherwise the public interests might suffer.<sup>11</sup> So the people, acting through their duly constituted officers, may employ any licensed attorney to appear for them in a criminal prosecution, as well as in other cases, unless, of course, it is forbidden by statute.<sup>12</sup>

**§ 698. Who May Appoint Assistants.** — As a general rule, the appointment of assistants to aid the district attorney is a matter which rests within the sound discretion of the court.<sup>13</sup> The

<sup>9</sup> *Tull v. State*, 99 Ind. 238; *State v. Whitworth*, 26 Mont. 107, 66 Pac. 748; *State v. O'Brien*, 35 Mont. 482, 10 Ann. Cas. 1006, 90 Pac. 514; *Chambers v. State*, 3 Humph. (Tenn.) 237; *Temple v. State*, (Tenn.) 155 S. W. 388; *McCue v. Com.* 103 Va. 870, 49 S. E. 623.

<sup>10</sup> *State v. Whitworth*, 26 Mont. 107, 66 Pac. 748.

<sup>11</sup> *Hinsdale County v. Crump*, 18 Colo. App. 59, 70 Pac. 159; *Tull v. State*, 99 Ind. 238; *State v. Bartlett*, 55 Me. 200; *State v. Orrick*, 106 Mo. 111, 17 S. W. 176, 329.

<sup>12</sup> *People v. Bemis*, 51 Mich. 422, 16 N. W. 794; *People v. O'Neill*, 107 Mich. 556, 65 N. W. 540; *State v. Coleman*, 199 Mo. 112, 97 S. W. 574; *Ex p. Gillespie*, 3 Yerg. (Tenn.) 325.

*Compare* *Clay County v. McGregor*, 171 Ind. 634, 17 Ann. Cas. 333, 87 N. E. 1, wherein it was held that as provision is made by statute for the election of prosecuting attorneys, who are authorized to appoint deputies to assist in the discharge of their official duties, and also for the appointment by the court of an attorney to prose-

cute for the term in case of the absence of the prosecuting attorney, an actual necessity for the appointment by the court of an attorney to assist the official prosecutor can scarcely be said to exist in any case; and if it is expedient and desirable that the state should have the assistance of other counsel in the conduct of an important and difficult case, the duty of providing for such emergencies rests primarily with the legislature.

<sup>13</sup> *United States*.—*Moreland v. Marion County*, 1 N. Y. Wkly. Dig. 326, 17 Fed. Cas. No. 9,794.

*Colorado*.—*Hinsdale County v. Crump*, 18 Colo. App. 59, 70 Pac. 159.

*Indiana*.—*Tull v. State*, 99 Ind. 238; *Keyes v. State*, 122 Ind. 527, 23 N. E. 1097.

*Louisiana*.—*State v. Britton*, 131 La. 877, 60 So. 379.

*Maine*.—*State v. Bartlett*, 55 Me. 200.

*Massachusetts*.—*Com. v. Williams*, 2 Cush. 582; *Com. v. Knapp*, 10 Pick. 477, 20 Am. Dec. 534; *Com. v. King*, 8 Gray 501.

*Ohio*.—*State v. Franklin County*

court, however, usually acts only on the request of the prosecuting attorney,<sup>14</sup> and in some instances it appears that the appointment of assistants is to be made by the prosecuting attorney under the direction and with the consent of the court.<sup>15</sup> But the court will not appoint an assistant merely because the prosecuting attorney, the injured person, or his friends, request that such appointment be made, nor unless, in the opinion of the court, the public interest requires such appointment.<sup>16</sup> An appointment cannot be made by a disqualified judge<sup>17</sup> or prosecuting attorney,<sup>18</sup> nor by a deputy prosecuting attorney.<sup>19</sup>

**§ 699. Who May Be Assistants.** — In appointing persons to assist the prosecuting attorney in the trial of a cause, it is the duty of the trial court to see that a proper selection is made in the interest of the state, and for the promotion of justice.<sup>20</sup> The ap-

Com'rs, 20 Ohio St. 421; Price v. State, 35 Ohio St. 601.

*South Dakota.*—State v. Johnson, 24 S. D. 590, 124 N. W. 847.

*Tennessee.*—Ex parte Gillespie, 3 Yerg. 325.

*Wisconsin.*—Biemel v. State, 71 Wis. 444, 37 N. W. 244.

<sup>14</sup> Com. v. Scott, 123 Mass. 222, 25 Am. Rep. 81; In re Prosecuting Attorney, 2 Ohio Dec. (Reprint) 602, 4 West. L. Month. 147.

<sup>15</sup> *Florida.*—Thalheim v. State, 38 Fla. 169, 20 So. 938.

*Idaho.*—People v. Biles, 2 Idaho 114, 6 Pac. 120.

*Indiana.*—Wood v. State, 92 Ind. 269; Shular v. State, 105 Ind. 289, 4 N. E. 870, 55 Am. Rep. 211.

*Iowa.*—Seaton v. Polk County, 59 Ia. 626, 13 N. W. 725; State v. Cobley, 128 Ia. 114, 103 N. W. 99.

*Michigan.*—Sneed v. People, 38 Mich. 248; Ulrich v. People, 39 Mich. 245.

*Nebraska.*—Bush v. State, 62 Neb. 128, 86 N. W. 1062; Johns v. State,

88 Neb. 145, 129 N. W. 247; McKay v. State, 90 Neb. 63, Ann. Cas. 1913B 1034, 132 N. W. 741, 39 L.R.A. (N.S.) 714; Goldsberry v. State, 92 Neb. 211, 137 N. W. 1116.

*New Jersey.*—State v. Board of Chosen Freeholders, 47 N. J. L. 417, 1 Atl. 701.

*New York.*—People v. Neff, 191 N. Y. 286, 84 N. E. 63, affirming 121 App. Div. 44, 105 N. Y. S. 559; People v. Coler, 35 Misc. 454, 16 N. Y. Crim. 23, 71 N. Y. S. 127.

*Virginia.*—Hopper v. Com., 6 Grat. 684.

<sup>16</sup> Price v. State, 35 Ohio St. 601.

<sup>17</sup> Dodd v. State, 5 Okla. Crim. 513, 115 Pac. 632.

<sup>18</sup> Hartgraves v. State, 5 Okla. Crim. 266, Ann. Cas. 1912D 180, 114 Pac. 343, 33 L.R.A. (N.S.) 568.

<sup>19</sup> People v. Hurst, 41 Mich. 328, 1 N. W. 1027.

<sup>20</sup> See Wiggins v. Com., 53 S. W. 649, 21 Ky. L. Rep. 939; People v. Etter, 72 Mich. 175, 40 N. W. 241; People v. Perriman, 72 Mich. 184, 40 N.

pointee must be a member of the bar,<sup>1</sup> unbiased in his representation of the state, and as ready and astute in protecting the accused if believed to be innocent, as in his labor for conviction if he believes him to be guilty;<sup>2</sup> and in several jurisdictions it is required that such assistants shall not be employed or paid by private persons.<sup>3</sup> It has been held that a lieutenant governor may be appointed as prosecuting attorney, notwithstanding the possibility of his succession to the office of governor, and his being called upon, in that capacity, to exercise the pardoning power.<sup>4</sup> So, unless prohibited by statute, a law partner of the prosecuting attorney may be appointed to assist him;<sup>5</sup> but in some jurisdictions law partners of district attorneys are forbidden to practice in the criminal courts.<sup>6</sup> Nor can it be objectionable, excepting in the mind of the accused, that an appointee has unusual ability in so presenting facts and circumstances to the court and jury that the truth may be made to appear.<sup>7</sup> Nor is it a sufficient ground of objection as against an assistant prosecuting attorney that he is a member of the legislature,<sup>8</sup> or that he entertains bias because of having been involved in political and legal controversies with the defendant's brother,<sup>9</sup> or because he is counsel in a civil action against the accused for the recovery of damages for the acts upon which the criminal prosecution is based,<sup>10</sup> or because he is prejudiced against the liquor traffic and the defendant is charged with a violation of the liquor laws,<sup>11</sup> or because he has formed an opinion to the effect that the accused is guilty of the crime charged,<sup>12</sup> or because he was a judicial officer at the time of the commission of

W. 425; *State v. Griffin*, 87 Mo. 608; *Goldsberry v. State*, 92 Neb. 211, 137 N. W. 1116.

<sup>1</sup> *King v. State*, 43 Fla. 211, 31 So. 254.

<sup>2</sup> *People v. Bemis*, 51 Mich. 422, 16 N. W. 794.

<sup>3</sup> See *infra*, § 702.

<sup>4</sup> *State v. Hawkins*, 27 Wash. 375, 67 Pac. 814.

<sup>5</sup> *People v. Gray*, 251 Ill. 431, 96 N. E. 268; *People v. Foote*, 93 Mich. 38, 52 N. W. 1036; *Richards v. State*, 82 Wis. 172, 51 N. W. 652; *Kraimer*

*v. State*, 117 Wis. 350, 93 N. W. 1097.

<sup>6</sup> See *supra*, § 71.

<sup>7</sup> *State v. Bartlett*, 55 Me. 200.

<sup>8</sup> *Ross v. State*, 8 Wyo. 351, 57 Pac. 924.

<sup>9</sup> *People v. Montague*, 71 Mich. 447, 39 N. W. 585.

<sup>10</sup> *State v. Ward*, 61 Vt. 153, 17 Atl. 483.

<sup>11</sup> *People v. O'Neill*, 107 Mich. 556, 65 N. W. 540.

<sup>12</sup> *Ross v. State*, 8 Wyo. 351, 57 Pac. 924.

the crime charged and, as such, denied bail to the defendant.<sup>13</sup> But a judge of a court of record cannot vacate the bench and prosecute a person charged with crime in his court, and before a jury drawn and impaneled by him; and a judgment of conviction obtained under such circumstances must be reversed.<sup>14</sup> An objection as to the qualification of assistant counsel should be raised, if known, at the earliest possible moment; laches in this respect may be fatal.<sup>15</sup>

**§ 700. Former Employment as Disqualification.**—As stated heretofore, the prosecuting attorney may himself be disqualified from acting in a particular case,<sup>16</sup> and a like disqualification may exist in those appointed to assist him. Thus, an attorney cannot be permitted to assist the district attorney if, by reason of professional relations with the accused, he has acquired a knowledge of the facts upon which the criminal charge against his former client is predicated, or which are closely interwoven therewith.<sup>17</sup> “With what confidence could one, arraigned upon a charge of crime, confer with his attorney, or reveal to him his evidence,

<sup>13</sup> *Ross v. State*, 8 Wyo. 351, 57 Pac. 924.

<sup>14</sup> *Lilly v. State*, 7 Okla. Crim. 284, 123 Pac. 575.

<sup>15</sup> *People v. Wood*, 99 Mich. 620, 58 N. W. 638.

<sup>16</sup> See *supra*, § 693.

<sup>17</sup> *Wilson v. State*, 16 Ind. 392; *State v. Halstead*, 73 Ia. 376, 35 N. W. 457; *Com. v. Gibbs*, 4 Gray (Mass.) 146; *State v. Howard*, 118 Mo. 127, 24 S. W. 41.

Attorneys at law are not mere mercenaries, who may desert the cause of those for whom they are enlisted, and take service on the other side, for no other reason than that their fees are not wholly paid. They are not bound to serve those who will not pay them, and may withdraw from the service of such; but they cannot take employment on the other side. The reason

of this rule is found in the relation of attorney and client, which is one of confidence and trust in the highest degree. The attorney becomes familiar with all facts connected with his client's cause; he learns from his client the weak points of the case, as well as the strong ones. Such knowledge carried by the recalcitrant attorney to the other side would be the sure means of defeat and injustice to the client. If attorneys are authorized, after employment, to take retainers from the other side, the exercise of this authority would be the means of oppression through which clients could be coerced into payment of extortionate fees; and the profession of the law would be brought into disgrace by permitting those who pursue it to take advantage of the secrets of litigants, obtained while the



and thereby prepare for his defense, if that officer is permitted, after thus acquiring such knowledge, to change their relative positions, and instead of standing up as his defender, to stand forth as his accuser? Would he not consider it better to stand mute, dumb, as the sheep before the shearer, rather than disclose the evidence which might thus be turned against him? He might, perhaps truthfully, believe it more to his interest to return to the practice of a semi-barbarous age, when the prisoner was not heard in his defense by counsel, or witnesses in his behalf, than thus to have the weapons of his defense turned against him by those in whom, by the acknowledged law and the statute, he had a right to confide."<sup>18</sup> Of course, a former employment in a separate and distinct matter, or a mere attempt to employ an attorney in the case at bar, or general dealings by which no knowledge is acquired, or could be acquired, as to the crime charged and the facts bearing thereon, will not be sufficient to disqualify one from accepting an appointment as assistant prosecuting attorney.<sup>19</sup>

**§ 701. Nonresidence as Disqualification.**—In most jurisdictions nonresident counsel may, as a matter of comity, be permitted to appear in a particular case or for particular purposes;<sup>20</sup> and, in accordance with this rule, it has been held that a nonresident attorney may be appointed an assistant prosecutor;<sup>1</sup> and the fact that he is not amenable to the court before which he appears,

confidential relation of attorney and client existed. The members of the profession must have the fullest confidence of their clients. If it may be abused, the profession will suffer by the loss of the confidence of the people. The good of the profession, as well as the safety of clients, demands the recognition and enforcement of these rules. *State v. Halstead*, 73 Ia. 376, 35 N. W. 457. See also *supra*, §§ 174-182.

<sup>18</sup> *Wilson v. State*, 16 Ind. 392.

<sup>19</sup> *Iowa*.—*State v. Lewis*, 96 Ia. 286, 65 N. W. 295.

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*Massachusetts*.—*Com. v. King*, 8 Gray 501.

*Michigan*.—*People v. Whittemore*, 102 Mich. 519, 61 N. W. 13.

*Texas*.—*Emerson v. State*, 54 Tex. Crim. 628, 114 S. W. 834.

*Wisconsin*.—*Lawrence v. State*, 50 Wis. 507, 7 N. W. 343, *distinguished* *Biemel v. State*, 71 Wis. 444, 37 N. W. 244.

<sup>20</sup> See *supra*, § 22.

<sup>1</sup> *People v. Thacker*, 108 Mich. 652, 66 N. W. 562; *Goldsberry v. State*, 92 Neb. 211, 137 N. W. 1116; *State v. Kent*, 4 N. D. 577, 62 N. W. 631, 27 L.R.A. 686.

it has been said, cannot prejudice the rights of the accused.<sup>2</sup> So, attorneys from another county may be appointed as assistants to the prosecuting attorney in the trial of a particular case.<sup>3</sup> In Wisconsin, however, a different rule prevails; and while it is there recognized that foreign counsel may, by special favor, be permitted to appear, they will not be permitted to assist in discharging the duties and performing the functions of the office of district attorney.<sup>4</sup>

**§ 702. Eligibility of Private Counsel.**—At common law criminal prosecutions were generally carried on by private persons who were interested in the conviction and punishment of the accused,<sup>5</sup> and, notwithstanding the election of public prosecutors, private counsel may still be employed and paid by private persons.<sup>6</sup> In most jurisdictions, however, private counsel will only

<sup>2</sup> *State v. Kent*, 4 N. D. 577, 62 N. W. 631, 27 L.R.A. 686.

<sup>3</sup> *State v. Corcoran*, 7 Idaho 220, 61 Pac. 1034; *State v. Novak*, 109 Ia. 717, 79 N. W. 465.

<sup>4</sup> *State v. Russell*, 83 Wis. 330, 53 N. W. 441.

<sup>5</sup> See *King v. State*, 43 Fla. 211, 31 So. 254.

A *private attorney* is one employed by, and in the interest of, private persons, and not paid out of public funds. He is one who has a special interest in the securing of a conviction, being employed by private persons to prosecute. He is not one who, like a public prosecutor, is presumed to do his duty in an earnest and faithful manner, impartially, and with the sole purpose of presenting the whole truth to the court and jury, both as to law and facts. *State v. Whitworth*, 26 Mont. 107, 66 Pac. 748. See also *Clinton v. State*, 58 Fla. 23, 50 So. 580.

<sup>6</sup> *United States*.—*U. S. v. Hanway*,

2 Wall. Jr. (C. C.) 139, 26 Fed. Cas. No. 15,299.

*California*.—*People v. Blackwell*, 27 Cal. 66; *People v. Turcott*, 65 Cal. 126, 3 Pac. 461; *People v. Powell*, 87 Cal. 348, 25 Pac. 481, 11 L.R.A. 75.

*Florida*.—*Thalheim v. State*, 38 Fla. 169, 20 So. 938.

*Hawaii*.—*Territory v. Chong Chak Lai*, 19 Hawaii 437, Ann. Cas. 1912B 657.

*Idaho*.—*State v. Steers*, 12 Idaho 174, 83 Pac. 104.

*Illinois*.—*Hayner v. People*, 213 Ill. 142, 72 N. E. 792; *People v. O'Farrell*, 247 Ill. 44, 93 N. E. 136; *Bergstrasser v. People*, 134 Ill. App. 609.

*Indiana*.—*Siebert v. State*, 95 Ind. 471; *Keyes v. State*, 122 Ind. 527, 23 N. E. 1097.

*Iowa*.—*State v. Fitzgerald*, 49 Ia. 260, 31 Am. Rep. 148; *State v. Montgomery*, 65 Ia. 483, 22 N. W. 639; *State v. Ormiston*, 66 Ia. 143, 23 N. W. 370; *State v. Shimmer*, 76 Ia. 147, 40 N. W. 144; *State v. Shreves*, 81

be permitted to act with the consent of the prosecuting attorney, and the permission of the court.<sup>7</sup> Of course, in granting such

*Ia.* 615, 47 N. W. 899; *State v. Crafton*, 89 *Ia.* 109, 56 N. W. 257; *State v. Helm*, 92 *Ia.* 540, 61 N. W. 246.

*Kansas*.—*State v. Wilson*, 24 *Kan.* 189, 36 *Am. Rep.* 257; *State v. Wells*, 54 *Kan.* 161, 37 *Pac.* 1005.

*Kentucky*.—*Price v. Caperton*, 1 *Duv.* 207; *Adams v. Com.*, 129 *Ky.* 255, 111 S. W. 348, 33 *Ky. L. Rep.* 779; *Catron v. Com.*, 140 *Ky.* 61, 130 S. W. 951; *Bennyfield v. Com.*, 17 S. W. 271, 13 *Ky. L. Rep.* 446.

*Louisiana*.—*State v. Mangrum*, 35 *La. Ann.* 619; *State v. Reed*, 49 *La. Ann.* 704, 21 *So.* 732; *State v. Petrich*, 122 *La.* 127, 47 *So.* 438. See also *State v. Cato*, 116 *La.* 195, 40 *So.* 633.

*Maine*.—*State v. Bartlett*, 55 *Me.* 200.

*Minnesota*.—*State v. Rue*, 72 *Minn.* 296, 75 N. W. 235.

*Mississippi*.—*Carlisle v. State*, 73 *Miss.* 387, 19 *So.* 207.

*Missouri*.—*State v. Robb*, 90 *Mo.* 30, 2 S. W. 1; *State v. Taylor*, 98 *Mo.* 240, 11 S. W. 570; *State v. Orrick*, 106 *Mo.* 111, 17 S. W. 176, 329.

*Montana*.—*State v. Tighe*, 27 *Mont.* 327, 71 *Pac.* 3; *State v. O'Brien*, 35 *Mont.* 482, 10 *Ann. Cas.* 1006, 90 *Pac.* 514.

*Nebraska*.—*Polin v. State*, 14 *Neb.* 540, 16 N. W. 898; *Bradshaw v. State*, 17 *Neb.* 147, 22 N. W. 361; *Gandy v. State*, 27 *Neb.* 707, 43 N. W. 747, 44 N. W. 108; *Blair v. State*, 72 *Neb.* 501, 101 N. W. 17.

*New Jersey*.—*Gardner v. State*, 55 *N. J. L.* 17, 26 *Atl.* 30.

*North Dakota*.—*State v. Kent*, 4 *N. D.* 577, 62 N. W. 631, 27 *L.R.A.* 686.

*Oklahoma*.—*Reed v. State*, 2 *Okl. Crim.* 589, 103 *Pac.* 1042.

*Texas*.—*Burkhard v. State*, 18 *Tex. App.* 599.

*Utah*.—*People v. Tidwell*, 4 *Utah* 506, 12 *Pac.* 61.

*Vermont*.—*State v. Ward*, 61 *Vt.* 153, 17 *Atl.* 483.

*Virginia*.—*Hopper v. Com.*, 6 *Grat.* 684; *Jackson v. Com.*, 96 *Va.* 107, 30 S. E. 452; *McCue v. Com.*, 103 *Va.* 870, 49 S. E. 623.

*Washington*.—*Stern v. State Board of Dental Examiners*, 50 *Wash.* 100, 96 *Pac.* 693.

<sup>7</sup> *California*.—*People v. Powell*, 87 *Cal.* 348, 25 *Pac.* 481, 11 *L.R.A.* 75.

*Illinois*.—*Hayner v. People*, 213 *Ill.* 142, 72 N. E. 792; *People v. O'Farrell*, 247 *Ill.* 44, 93 N. E. 136; *People v. Blevins*, 251 *Ill.* 381, *Ann. Cas.* 1912C 451, 96 N. E. 214; *People v. Gray*, 251 *Ill.* 431, 96 N. E. 268.

*Indiana*.—*Siebert v. State*, 95 *Ind.* 471.

*Iowa*.—*State v. Fitzgerald*, 49 *Ia.* 260, 31 *Am. Rep.* 148; *State v. Montgomery*, 65 *Ia.* 483, 22 N. W. 639.

*Kansas*.—*State v. Wilson*, 24 *Kan.* 189, 36 *Am. Rep.* 257; *State v. Wells*, 54 *Kan.* 161, 37 *Pac.* 1005.

*Maine*.—*State v. Bartlett*, 55 *Me.* 200.

*Minnesota*.—*State v. Rue*, 72 *Minn.* 296, 75 N. W. 235.

*Mississippi*.—*Edwards v. State*, 47 *Miss.* 581.

*Montana*.—*State v. Tighe*, 27 *Mont.* 327, 71 *Pac.* 3; *State v. Biggs*, 45 *Mont.* 400, 123 *Pac.* 410.

*Nebraska*.—*Bradshaw v. State*, 17 *Neb.* 147, 22 N. W. 361; *McKay v.*

permission, the court should be satisfied that no hindrance is placed in the path of justice;<sup>8</sup> and it is presumed that its action is a sufficient guaranty that the accused will not be made the victim of an overzealous prosecution by private persons.<sup>9</sup> There is much to be said in favor of this position;<sup>10</sup> on the other hand, however,

State, 90 Neb. 63, Ann. Cas. 1913B 1034, 132 N. W. 741, 39 L.R.A.(N.S.) 714, 91 Neb. 281, Ann. Cas. 1913B 1039, 135 N. W. 1024, 39 L.R.A.(N.S.) 720.

*North Dakota*.—State *v. Kent*, 4 N. D. 577, 62 N. W. 631, 27 L.R.A. 686.

*Oklahoma*.—Reed *v. State*, 2 Okla. Crim. 589, 103 Pac. 1042.

*Washington*.—State *v. Hoshor*, 26 Wash. 643, 67 Pac. 386; Stern *v. State Board of Dental Examiners*, 50 Wash. 100, 96 Pac. 693.

<sup>8</sup> Hayner *v. People*, 213 Ill. 142, 72 N. E. 792; Goldsberry *v. State*, 92 Neb. 211, 137 N. W. 1116.

<sup>9</sup> State *v. Kent*, 4 N. D. 577, 62 N. W. 631, 27 L.R.A. 686.

<sup>10</sup> *Argument in Favor of Private Counsel*.—"The fact that the state's attorney who controls criminal cases is not allowed to receive any compensation from private prosecutors for the prosecution of a criminal cause does not warrant the conclusion that counsel paid by private persons shall not be permitted to assist in the trial of such a case. It is one thing to have the prosecution entirely in the hands of one who may be influenced, because of a retainer, by the strong desire of his client to secure a conviction; but it is an entirely different thing to allow such an interested counsel to aid in the prosecution of one who stands affected by no other motive than that of securing the punishment of guilt, and who has absolute control over the case. The law

has removed criminal prosecutions from the control of private interests, but it has not excluded such interests from all participation therein. If no error is committed on the trial, we fail to see how an accused can be prejudiced by the fact that those personally interested have employed private counsel to aid the public prosecutor. Certainly, he should not be heard to complain of the zeal of the private counsel, if such counsel has not allowed his zeal to hurry him into error. The best mode of reaching the truth is by the strenuous contentions of opposing counsel, each animated by the conviction that the cause he has espoused is just. The public have some interests at stake in a criminal prosecution. May all the zeal be displayed on one side, and none be tolerated on the other? The public interests demand that a prosecution should be conducted with energy and skill. While the prosecuting officer should see that no unfair advantage is taken of the accused, yet he is not a judicial officer. Those who are required to exercise judicial functions in the case are the judge and the jury. The public prosecutor is necessarily a partisan in the case. If he were compelled to proceed with the same circumspection as the judge and the jury, there would be an end to the conviction of criminals. Zeal in the prosecution of criminal cases is therefore to be commended, and not condemned. It is the zeal of counsel in the court

it would seem that the prosecuting officer and the court would know when assistance was required, and that the legislature should provide therefor, and that such assistance should be paid for by the state, and not by any individual. And where the law does provide for the employment of special assistants in those cases,<sup>11</sup> counsel employed and paid by private persons should not be permitted

room, alone, of which the accused can complain. No decision can be found which questions the right of the prosecuting officer to consult with, and receive all manner of aid, even during the trial, from counsel for private parties, outside of the court room. And if such zeal in the court room, on the trial, does not result in error, what conceivable difference can it make whether such assistant was employed by the public, or by private persons? May not cross-examination of witnesses be conducted, and arguments to the court and jury be made, by one who is as much convinced of the guilt of the accused as his counsel is persuaded of his innocence? The manner of conducting the case in the court room cannot work legal prejudice to the accused, without resulting in error for which the conviction will be set aside. It is therefore of no legal importance what inspires the zeal of the attorney who assists in the trial. Whatever is done to the injury of the prisoner by private counsel, for which he can have no redress, is done out of court; for instance, by concealing or fabricating evidence. At just this point, where the zeal of counsel employed by private parties may be deadly to the accused, no kind of safeguard is or can be thrown around him. The prosecuting officer may consult with, and be entirely governed by the advice of,

such private counsel; and yet the accused has no remedy, if the private counsel does not participate in the trial. If he does so participate, his zeal works no more prejudice to the accused than the zeal of an other equally able counsel who may be employed by the public. The cases all agree that an assistant hired by the public may engage in the trial without giving the prisoner any legal cause for complaint. Of course, the latter may think he is prejudiced because of being compelled to confront an exceptionally able and experienced prosecutor, but this furnishes no legal ground for overthrowing the conviction. The question can be placed in a clear light by the following statement of it: Can a defendant in a criminal case, who is obliged to submit to the zeal of an assistant prosecutor employed by the public, insist that the zeal of an assistant counsel employed by interested parties, shall not be displayed against him, although it results in no error on the part of the prosecution in the management of the case? We think there is only one answer to this question, and that is against the right of the accused to complain in either case, so long as no error has been committed by the assistant on the trial." Per Corliss, J., *State v. Kent*, 4 N. D. 577, 62 N. W. 631, 27 L.R.A. 686.

<sup>11</sup> See *supra*, § 697.

to act,<sup>12</sup> even at the instance of the prosecuting attorney.<sup>13</sup> But it has been held, even where this position is maintained, that private counsel may be heard on *habeas corpus* proceedings.<sup>14</sup> Nor is an action for the recovery of a penalty for the obstruction of a highway such a criminal proceeding as will prevent the prosecutor therein from employing private counsel, or prevent such counsel from taking part in the prosecution of the suit.<sup>15</sup>

### § 703. Number of Assistants and Time of Appointment. —

The number of counsel which will be permitted to engage in a trial, as assistants to the prosecuting attorney, must be determined by the trial court, in the exercise of a sound judicial discretion, taking into consideration the facts and circumstances of the particular case;<sup>16</sup> and unless its discretion has been abused to the prejudice of the defendant, or in a manner affecting the merits of the cause, the appellate court will not interfere.<sup>17</sup> Where four attorneys were appointed to conduct a prosecution because of the disqualification of the prosecuting attorney, the appellate court declined to reverse a judgment of conviction on the ground of such appointment, although the action of the trial court was censured.<sup>18</sup> But the court should not permit counsel for defendant to be overwhelmed, on account of inexperience, by the number and ability of counsel assisting the state's attorney.<sup>19</sup> In the absence of regu-

<sup>12</sup> *Massachusetts*.—*Com. v. Gibbs*, 4 Gray 146; *Com. v. Williams*, 2 Cush. 582; *Com. v. Knapp*, 10 Pick. 477, 20 Am. Dec. 534; *Com. v. Scott*, 123 Mass. 222, 25 Am. Rep. 81.

*Michigan*.—*Meister v. People*, 31 Mich. 99; *Sneed v. People*, 38 Mich. 248; *People v. Hurst*, 41 Mich. 328, 1 N. W. 1027; *People v. Hendryx*, 58 Mich. 319, 25 N. W. 299; *McCurdy v. New York L. Ins. Co.*, 115 Mich. 20, 72 N. W. 996, 4 Detroit Leg. N. 738.

*Wisconsin*.—*Biemel v. State*, 71 Wis. 444, 37 N. W. 244; *Bird v. State*, 77 Wis. 276, 45 N. W. 1126; *State v. Huegin*, 110 Wis. 189, 85 N. W. 1046, 62 L.R.A. 700.

<sup>13</sup> *Sneed v. People*, 38 Mich. 248; *Biemel v. State*, 71 Wis. 444, 37 N. W. 244.

<sup>14</sup> *State v. Huegin*, 110 Wis. 189, 85 N. W. 1046, 62 L.R.A. 700.

<sup>15</sup> *La Barre v. Bent*, 154 Mich. 520, 118 N. W. 6, 15 Detroit Leg. N. 822.

<sup>16</sup> *Thalheim v. State*, 38 Fla. 169, 20 So. 938; *Com. v. Knapp*, 9 Pick. (Mass.) 496, 20 Am. Dec. 491.

<sup>17</sup> *State v. Griffin*, 87 Mo. 608; *State v. Sweeney*, 93 Mo. 38, 5 S. W. 614.

<sup>18</sup> *State v. Griffin*, 87 Mo. 608.

<sup>19</sup> *People v. Blevins*, 251 Ill. 381, Ann. Cas. 1912C 451, 96 N. E. 214.

It might be a wrong and oppression

lation by statute or rule of court, it would seem that assistant counsel may be appointed at any time. It is true, of course, that the necessity therefor may arise even during the conduct of a trial, as, for instance, where the prosecutor is taken ill, and aid becomes necessary to prevent delay, annoyance, unnecessary expense and, perhaps, a failure of justice.<sup>20</sup> In some jurisdictions, however, it is required that the defendant in a criminal case should be informed not only of the nature of the accusation, but also of the forces which are to be marshaled against him;<sup>1</sup> but this requirement, it has been held, is sufficiently complied with where it appears that defendant's counsel has an opportunity to examine all of the jurors touching their acquaintance or affiliation with the appointee, even though some jurors may have been examined before the appointment was made.<sup>2</sup>

§ 704. **Qualification Generally and Tenure.**—In the appointment of deputies, substitutes, or assistant prosecuting attorneys, all statutory requirements should be complied with. The local laws must be consulted in this respect.<sup>3</sup> It is not necessary,

to a defendant to permit able and experienced counsel employed by private parties to assist a competent state's attorney in a contest with inexperienced or inefficient counsel for the defense. *Hayner v. People*, 213 Ill. 142, 72 N. E. 792.

<sup>20</sup> *State v. Cogley*, 128 Ia. 114, 103 N. W. 99.

<sup>1</sup> *Knights v. State*, 58 Neb. 225, 78 N. W. 508, 76 Am. St. Rep. 78; *Galloway v. State*, 88 Neb. 447, 129 N. W. 987.

<sup>2</sup> *Johns v. State*, 88 Neb. 145, 129 N. W. 247. See also *Galloway v. State*, 88 Neb. 447, 129 N. W. 987.

<sup>3</sup> *United States*.—U. S. Rev. Stat. sec. 793, (4 Fed. Stat. Annot. 72); *In re Farrow*, 3 Fed. 112, 4 Woods 491.

*Florida*.—*King v. State*, 43 Fla. 211, 31 So. 254.

*Michigan*.—*People v. Wright*, 89 Mich. 70, 50 N. W. 792, *distinguishing* *People v. Bussey*, 82 Mich. 49, 46 N. W. 97.

*Missouri*.—*State v. Taylor*, 98 Mo. 240, 11 S. W. 570.

*Nebraska*.—*Gandy v. State*, 27 Neb. 707, 43 N. W. 747, 44 N. W. 108; *Bush v. State*, 62 Neb. 128, 86 N. W. 1062; *Johns v. State*, 88 Neb. 145, 129 N. W. 247; *McKay v. State*, 90 Neb. 63, Ann. Cas. 1913B 1034, 132 N. W. 741, 39 L.R.A.(N.S.) 714, 91 Neb. 281, Ann. Cas. 1913B 1039, 135 N. W. 1024, 39 L.R.A.(N.S.) 720; *Goldsberry v. State*, 92 Neb. 211, 137 N. W. 1116.

*New York*.—*People v. Taylor*, 17 Misc. 505, 40 N. Y. S. 321.

*North Dakota*.—*State v. Kent*, 4 N. D. 577, 62 N. W. 631, 27 L.R.A. 686.

*Ohio*.—*Martin v. State*, 16 Ohio 364.

however, that such appointments should be drawn up with the technical accuracy required in pleadings, or other legal documents.<sup>4</sup> It has been held that the fact of being permitted by the trial court to proceed with a cause in the absence of the prosecuting officer, is equivalent to an appointment;<sup>5</sup> and also that the overruling of an objection, by the defendant, to counsel assisting the district attorney, the latter being present and not objecting, is equivalent to a request by the prosecutor, and permission by the court, that such counsel assist in the prosecution.<sup>6</sup> It will be presumed, in the absence of a showing to the contrary, that all the legal requirements were complied with;<sup>7</sup> and in some jurisdictions it has been held that statutes providing for the appointment of substitute and assistant prosecuting attorneys are not exclusive,<sup>8</sup> so that, in those states, the absence of statutory formalities would seem to be immaterial.<sup>9</sup>

The tenure of office of deputy district attorneys is provided for by statute; as a rule, it is coextensive with that of the

*Oklahoma*.—*Dodd v. State*, 5 Okla. Crim. 513, 115 Pac. 632.

*South Dakota*.—*State v. Phelps*, 5 S. D. 480, 59 N. W. 471.

*Texas*.—*Murrey v. State*, 48 Tex. Crim. 219, 87 S. W. 349.

<sup>4</sup> *U. S. v. Twining*, 132 Fed. 129; *Colbert v. State*, 125 Wis. 423, 104 N. W. 61.

<sup>5</sup> *State v. Duncan*, 116 Mo. 288, 22 S. W. 699.

<sup>6</sup> *Rounds v. State*, 57 Wis. 45, 14 N. W. 865, distinguished *Biemel v. State*, 71 Wis. 453, 37 N. W. 244.

<sup>7</sup> *United States*.—*U. S. v. Twining*, 132 Fed. 129.

*Indiana*.—*Shattuck v. State*, 11 Ind. 473.

*Massachusetts*.—*Com. v. Scott*, 123 Mass. 222, 25 Am. Rep. 81.

*Minnesota*.—*State v. Borgstrom*, 69 Minn. 508, 72 N. W. 799, 975.

*Missouri*.—*State v. Wilson*, 200 Mo. 23, 98 S. W. 68.

*Montana*.—*State v. O'Brien*, 35 Mont. 482, 10 Am. Cas. 1006, 90 Pac. 514.

*Nebraska*.—*Spaulding v. State*, 61 Neb. 289, 85 N. W. 80; *Blair v. State*, 72 Neb. 501, 101 N. W. 17; *McKay v. State*, 90 Neb. 63, Ann. Cas. 1913 B 1034, 132 N. W. 741, 39 L.R.A. (N.S.) 714, 91 Neb. 281, Ann. Cas. 1913 B 1039, 135 N. W. 1024, 39 L.R.A. (N.S.) 720; *Goldsberry v. State*, 92 Neb. 211, 137 N. W. 1116.

*North Dakota*.—*State v. Tough*, 12 N. D. 425, 96 N. W. 1025.

*Ohio*.—*Price v. State*, 35 Ohio St. 601.

*Tennessee*.—*Douglass v. State*, 6 Yerg. 525; *Turner v. State*, 89 Tenn. 547, 15 S. W. 838.

<sup>8</sup> See *supra*, § 696 note. See also *supra*, § 697 note.

<sup>9</sup> *People v. Walters*, 98 Cal. 138, 32 Pac. 864.



prosecuting officer.<sup>10</sup> Substitute prosecutors are usually appointed for a specific purpose, on the accomplishment of which the appointment comes to an end, or until the disability, because of which the appointment was made, ceases,<sup>11</sup> and the prosecuting officer resumes his official position; <sup>12</sup> but such appointments are not limited to a single term of court.<sup>13</sup>

*Power, Duty, Liability and Compensation.*

§ 705. **Duties Generally.** — The duties of a prosecuting attorney are usually prescribed by statute,<sup>14</sup> and may be increased or diminished as the legislature may see fit,<sup>15</sup> and in some instances certain duties are imposed by the constitution; but the prosecutor cannot be compelled to perform acts other than those so provided for.<sup>16</sup> The prosecutor represents the people, and his right to do so, as expressed in the constitution or statute, cannot be restricted

<sup>10</sup> *State v. Mechem*, 31 Kan. 435, 2 Pac. 816; *State v. Montgomery*, 25 La. Ann. 138; *State v. Rankin*, 33 Neb. 266, 49 N. W. 1121; *State v. Manlove*, 33 Tex. 798.

<sup>11</sup> *King v. State*, 43 Fla. 211, 31 So. 254; *In re Prosecuting Attorney*, 2 Ohio Dec. (Reprint) 602, 4 West L. Month. 147.

<sup>12</sup> Return of regular district attorney vacates appointment. *State v. Hart*, (La.) 62 So. 161.

*Prosecutor May Enter Cause on Recovery.*—The cause which necessitates the absence of a district attorney having ceased, it is his duty to report to the court; and, having done so, it is unobjectionable that he participate in the prosecution. *State v. Smith*, 107 La. 129, 31 So. 693, 1014.

In *State v. Smith*, 107 La. 129, 31 So. 693, 1014, it was held that after an attorney has been appointed by the court to represent the district attorney, he may continue in the prosecu-

tion of the case to the end, although the district attorney had resumed full charge of the case.

<sup>13</sup> *State v. Hart*, (La.) 62 So. 161.

<sup>14</sup> *United States*.—U. S. v. Morin, 4 Biss. 93, 26 Fed. Cas. No. 15,810.

*Idaho*.—Board of County Com'rs v. Bassett, 14 Idaho 324, 93 Pac. 774.

*Indiana*.—*State v. Morrison*, 64 Ind. 141.

*Kansas*.—*Clough v. Hart*, 8 Kan. 487.

*Oklahoma*.—*Mahaffey v. Territory*, 11 Okla. 213, 66 Pac. 342.

*Right to Sue*.—There is no power vested in the district attorneys of the United States to sue in the name of the government. Their powers are defined in the several statutes creating the office and defining its duties. *Cohen v. U. S.*, 38 App. Cas. (D. C.) 123.

<sup>15</sup> *State v. Morrison*, 64 Ind. 141.

<sup>16</sup> *Bevington v. Woodbury County*, 107 Ia. 424, 78 N. W. 222.

or superseded excepting in the manner provided for by law.<sup>17</sup> He is vested with a personal discretion as a minister of justice, and it is his duty to act impartially. He must guard the interests of public justice in behalf of all concerned, and he must not become entangled with private grievances which will prevent him from properly performing his official duties.<sup>18</sup> A prosecuting officer is invested with a broad discretion, subject to a certain judicial control,<sup>19</sup> and he will not be excused for the nonperformance of his official duties because of local sentiment or popular clamor.<sup>20</sup>

§ 706. **Criminal Prosecutions.** — Acting within the law,<sup>1</sup> it is the right and the duty of prosecuting attorneys to prosecute all persons who violate the penal laws within their districts;<sup>2</sup> nor can

<sup>17</sup> *Mahaffey v. Territory*, 11 Okla. 213, 66 Pac. 342; *Kelly v. Ferguson*, 5 Okla. Crim. 316, 114 Pac. 631.

<sup>18</sup> *Indiana*.—*State v. Henning*, 33 Ind. 189.

*Michigan*.—*People v. Bemis*, 51 Mich. 422, 16 N. W. 794; *Engle v. Chipman*, 51 Mich. 524, 16 N. W. 886.

*New York*.—*People v. Kurminsky*, 23 Misc. 504, 52 N. Y. S. 609.

*Oklahoma*.—*Kelly v. Ferguson*, 5 Okla. Crim. 316, 114 Pac. 631.

*Pennsylvania*.—*Com. v. Bubnis*, 197 Pa. St. 542, 47 Atl. 748.

<sup>19</sup> *State v. Russell*, 83 Wis. 330, 53 N. W. 441.

<sup>20</sup> *In re Voss*, 11 N. D. 540, 90 N. W. 15. See also *State v. Foster*, 32 Kan. 14, 3 Pac. 534; *Michael v. Matson*, 81 Kan. 360, 105 Pac. 537.

<sup>1</sup> *United States*.—*Snow v. U. S.*, 18 Wall. 317, 21 U. S. (L. ed.) 784.

*Idaho*.—*People v. Heed*, 1 Idaho 531.

*Missouri*.—*Hill v. Butler County*, 195 Mo. 511, 94 S. W. 518.

*Montana*.—*Independent Pub. Co. v. Lewis & Clarke County*, 30 Mont. 83, 75 Pac. 860.

*Texas*.—*Harris County v. Stewart*, 91 Tex. 133, 41 S. W. 650; *Fleming v. State*, 28 Tex. App. 234, 12 S. W. 605.

<sup>2</sup> *Arkansas*.—*Holder v. State*, 58 Ark. 473, 25 S. W. 279.

*Colorado*.—*Atchison, T. & S. F. R. Co. v. People*, 5 Colo. 60.

*Georgia*.—*Blalock v. Pillsbury*, 76 Ga. 493; *Fambrough v. State*, 113 Ga. 934, 39 S. E. 324; *Williams v. State*, 121 Ga. 195, 48 S. E. 938.

*Kansas*.—*State v. Foster*, 32 Kan. 14, 3 Pac. 534; *State v. Trinkle*, 70 Kan. 396, 78 Pac. 854.

*Kentucky*.—*Thompson v. Carr*, 13 Bush 215; *Adams v. Com.*, 129 Ky. 255, 111 S. W. 348, 33 Ky. L. Rep. 779; *Kecton v. Com.*, 108 S. W. 315, 32 Ky. L. Rep. 1164.

*Nebraska*.—*Bartley v. State*, 53 Neb. 310, 73 N. W. 744; *Dinsmore v. State*, 61 Neb. 418, 85 N. W. 445.

*Oklahoma*.—*Mahaffey v. Territory*, 11 Okla. 213, 66 Pac. 342; *Board of Com'rs v. State Capital Co.*, 16 Okla. 625, 86 Pac. 518; *Mitchell v. State*, 7 Okla. Crim. 563, 124 Pac. 1112.

*Tennessee*.—*State v. Kittrell*, 7

they be superseded therein,<sup>3</sup> excepting where they become disabled or disqualified.<sup>4</sup> They are, however, subject to a certain judicial control in many things, and this is particularly true as to the conduct of the trial.<sup>5</sup> The prosecuting officer may institute criminal prosecutions,<sup>6</sup> and in some jurisdictions he must do so, when notified of a violation of the law;<sup>7</sup> but, in the absence of statutory regulation, it would seem that a prosecuting officer is not obliged to act on his own knowledge or belief that a crime has been committed.<sup>8</sup> The advice of prosecuting attorneys as a protection to persons commencing criminal prosecutions has been considered in another chapter.<sup>9</sup> So, as a general rule, the prosecuting officer may do whatever is essential to bring criminals to trial, conduct the trial, make all motions that he believes to be necessary therein, and take such steps after the trial as may seem to him proper, providing, of course, that in so doing his conduct does

Baxt. 167; *Moore v. State*, 5 Sneed 510.

*Texas*.—*Jackson v. Swayne*, 92 Tex. 242, 47 S. W. 711.

<sup>3</sup> *United States*.—*Fish v. U. S.*, 36 Fed. 677.

*Iowa*.—*State v. Grimmell*, 116 Ia. 596, 88 N. W. 342.

*Kentucky*.—*Keeton v. Com.*, 108 S. W. 315, 32 Ky. L. Rep. 1164.

*Oklahoma*.—*Board of Com'rs v. State Capital Co.*, 16 Okla. 625, 86 Pac. 518.

*Texas*.—*Howth v. Greer*, 40 Tex. Civ. App. 552, 90 S. W. 211; *Upton v. San Angelo*, 42 Tex. Civ. App. 76, 94 S. W. 436.

<sup>4</sup> See *supra*, §§ 696, 697. And see also *infra*, § 713.

<sup>5</sup> *England*.—*Rex v. Phillips*, 3 Burr. 1564, 4 Burr. 2089.

*United States*.—*U. S. v. Morin*, 4 Biss. 93, 26 Fed. Cas. No. 15,810; *U. S. v. Scroggins*, 3 Woods 529, 27 Fed. Cas. No. 16,244.

*California*.—*Ex p. Williams*, 116

Cal. 512, 48 Pac. 499; *Ex p. Hayter*, 16 Cal. App. 211, 116 Pac. 370.

*Kansas*.—*State v. Foster*, 32 Kan. 14, 3 Pac. 534; *State v. Trinkle*, 70 Kan. 396, 78 Pac. 854.

*Louisiana*.—*State v. Cole*, 38 La. Ann. 843.

*Michigan*.—*Beecher v. Anderson*, 45 Mich. 543, 8 N. W. 539; *Engle v. Chipman*, 51 Mich. 524, 16 N. W. 886.

*New York*.—*People v. Rosenthal*, 197 N. Y. 394, 90 N. E. 991.

*Pennsylvania*.—*Com. v. Hipple*, 69 Pa. St. 9.

*Texas*.—*Murphy v. Sumners*, 54 Tex. Crim. 369, 112 S. W. 1070.

<sup>6</sup> *Bartley v. State*, 53 Neb. 310, 73 N. W. 744; *State v. Guglielmo*, 46 Ore. 250, 7 Ann. Cas. 976, 79 Pac. 577, 80 Pac. 103, 69 L.R.A. 466; *Treasurer of Vermont v. Brooks*, 23 Vt. 698.

<sup>7</sup> *State v. Trinkle*, 70 Kan. 396, 78 Pac. 854.

<sup>8</sup> *State v. Trinkle*, 70 Kan. 396, 78 Pac. 854.

<sup>9</sup> *Supra*, § 377.

not conflict with the general laws of his state, or of the United States, or with his duties as an officer and an attorney at law.<sup>10</sup> Prosecuting officers are not obliged to appear in the courts of committing magistrates unless that duty is imposed upon them by the legislature, but they may do so should they deem it advisable;<sup>11</sup> and while the magistrate is not bound by the judgment of a district attorney, nor need he act upon his advice, he will seldom hold a defendant to bail, or convict him on trial should he have jurisdiction to do so, when the district attorney advises him in good faith that a crime has not been established.<sup>12</sup> The duty of prosecuting attorneys in conducting trials is considered elsewhere.<sup>13</sup>

**§ 707. Proceedings before Grand Jury.**—The prosecuting attorney is, as a general rule, authorized to appear before the grand jury and aid in the presentation of the facts; private counsel should not be permitted to discharge this duty.<sup>14</sup> Nor has one whose conduct is under investigation by a grand jury, any right to demand that he be permitted to go before such jury for the purpose of explaining the charges preferred against him.<sup>15</sup> A substitute or deputy district attorney would, of course, be permitted to take the place of the regular officer during his absence or in-

<sup>10</sup> *State v. New Jersey Jockey Club*, 52 N. J. L. 493, 19 Atl. 976; *Carnal v. People*, 1 Park. Crim. (N. Y.) 262; *People v. Columbia County Sup'rs*, 134 N. Y. 1, 31 N. E. 322; *Wood v. State*, 4 Okla. Crim. 436, 112 Pac. 11; *Fields v. State*, Mart. & Y. (Tenn.) 168.

<sup>11</sup> *State v. Jackson*, 68 Ind. 58; *State v. Bezou*, 48 La. Ann. 1369, 20 So. 892; *State v. Brown*, 106 La. 437, 31 So. 50; *Smith v. Portage County Com'rs*, 9 Ohio 25.

<sup>12</sup> *Beecher v. Anderson*, 45 Mich. 543, 8 N. W. 539.

<sup>13</sup> See *infra*, §§ 712-714.

<sup>14</sup> *Florida*.—*Miller v. State*, 42 Fla. 266, 28 So. 208.

*Minnesota*.—*State v. Slocum*, 111 Minn. 328, 126 N. W. 1096.

*Mississippi*.—*Durr v. State*, 53 Miss. 425; *Wilson v. State*, 70 Miss. 595, 13 So. 225, 35 Am. St. Rep. 664; *State v. Barnett*, 98 Miss. 812, 54 So. 313; *Collier v. State*, 61 So. 689.

*New York*.—*People v. Scannell*, 36 Misc. 40, 72 N. Y. S. 449.

*North Dakota*.—*Ex p. Corliss*, 16 N. D. 470, 114 N. W. 962.

*Oklahoma*.—*Reed v. State*, 2 Okla. Crim. 589, 103 Pac. 1042; *State v. Mabon*, 5 Okla. Crim. 581, 114 Pac. 1122.

*South Carolina*.—*State v. Addison*, 2 S. C. 356.

*Texas*.—*Rothschild v. State*, 7 Tex. App. 519.

<sup>15</sup> *Matter of Lyons*, 162 Mo. App. 688, 145 S. W. 844.

capacity; and in some instances private counsel have been permitted to appear before the grand jury.<sup>16</sup>

**§ 708. Civil Actions.** — In several states certain civil duties are imposed on prosecuting attorneys, and this is especially true where that officer is also the county attorney. As a general rule, the duties so imposed are confined to representing the county in such civil actions as may be brought by or against it, in preventing the misappropriation of its funds or property, and in representing it in any other respect when requested by the county authorities. In some jurisdictions the prosecutor is also required to collect fines and penalties, and to recover on forfeited recognizances. So, in some instances, the prosecuting officer is required under local statutes to represent the state in certain civil actions. Statutes of this character show absolutely no uniformity, and are so frequently changed that little can be said of them even in the same jurisdiction. The local laws must be consulted in each instance. Of course, a prosecuting attorney, in representing his district, county or state in civil actions, would be governed by the principles stated throughout this work with reference to lawyers generally. Whether they are required or authorized to sue for minor governmental instrumentalities, such as drainage districts, included within the county, depends on the local statutes.<sup>17</sup>

**§ 709. Authority outside of District.** — Prosecuting officers are elected for specified districts, and have no authority outside

<sup>16</sup> *United States*.—U. S. *v.* Haskell, 169 Fed. 449; U. S. *v.* Heinze, 177 Fed. 770.

*Alabama*.—Blevins *v.* State, 68 Ala. 92; Jones *v.* State, 150 Ala. 54, 43 So. 179.

*Arkansas*.—Bennett *v.* State, 62 Ark. 516, 36 S. W. 947.

*Colorado*.—Raymond *v.* People, 2 Colo. App. 329, 30 Pac. 504.

*Florida*.—Taylor *v.* State, 49 Fla. 69, 38 So. 380.

*Idaho*.—State *v.* Coreoran, 7 Idaho 220, 61 Pac. 1034.

*Iowa*.—State *v.* Kovolosky, 92 Ia.

498, 61 N. W. 223; State *v.* Tyler, 122 Ia. 125, 97 N. W. 983; State *v.* Miller, 132 Ia. 587, 109 N. W. 1087.

*Louisiana*.—State *v.* Hart, 62 So. 161.

*Texas*.—State *v.* Johnson, 12 Tex. 231; State *v.* Gonzales, 26 Tex. 197; Wilson *v.* State, 41 Tex. Crim. 115, 51 S. W. 916.

<sup>17</sup> See Lincoln County *v.* Robertson, 35 Okla. 616, 130 Pac. 947, in which it was held that such suits were no part of the duty of the county attorney.

of them either to institute or conduct criminal prosecutions,<sup>18</sup> or to bring an action in the name of the state on their relation.<sup>19</sup> Thus, where a change of venue has been allowed, the prosecutor from the county wherein the indictment was found cannot try the case in the county to which it has been removed; but such trial must be conducted by the prosecutor of the latter county,<sup>20</sup> unless the prosecutor from the first county is appointed as an assistant for that purpose.<sup>1</sup> Such an appointment, however, is usually made in those cases; and services so rendered in another county may be paid for in addition to the prosecutor's regular salary, notwithstanding a statute to the effect that prosecuting attorneys may not receive any fee or reward, for services rendered in cases which it is their duty to prosecute, from any prosecutor or individual.<sup>2</sup> So, it has been held that where the duties of a prosecuting attorney are fixed by the constitution as being confined to a certain judicial district, the legislature can neither authorize nor require him to go outside of it, unless, possibly, by changing the district.<sup>3</sup> Of course, where a district attorney is the prosecuting officer for several districts or counties, he may act in all of them.<sup>4</sup>

**§ 710. Authority to Incur Expense.** — An attorney's authority to conduct litigation usually carries with it the authority to in-

<sup>18</sup> *Martin v. State*, 39 Kan. 576, 18 Pac. 472.

<sup>19</sup> *State v. Shearman*, 51 Kan. 686, 35 Pac. 455.

<sup>20</sup> *United States*.—*Delaware v. Emerson*, 8 Fed. 411.

*California*.—*Herrington v. Santa Clara County*, 44 Cal. 496.

*Iowa*.—*Bevington v. Woodbury County*, 107 Ia. 424, 78 N. W. 222, *practically overruling State v. Carothers*, 1 G. Greene 464.

*Kansas*.—*Leavenworth County Com'rs v. Brewer*, 9 Kan. 307.

*Kentucky*.—*Thompson v. Carr*, 13 Bush 215; *Slayton v. Rogers*, 128 Ky. 106, 107 S. W. 696, 32 Ky. L. Rep. 897.

*Montana*.—*State v. Whitworth*, 26 Mont. 107, 66 Pac. 748.

*Nebraska*.—*Gandy v. State*, 27 Neb. 707, 43 N. W. 747, 44 N. W. 108.

*Pennsylvania*.—*Contra*.—*Com. v. Hipple*, 69 Pa. St. 9.

<sup>1</sup> See *supra*, § 696; *Clay County v. McGregor*, 171 Ind. 634, 17 Ann. Cas. 333, 87 N. E. 1.

<sup>2</sup> *People v. Fuhrmann*, 103 Mich. 593, 61 N. W. 865.

<sup>3</sup> *Thompson v. Carr*, 13 Bush (Ky.) 215.

<sup>4</sup> *Moreland v. Marion County*, 1 N. Y. Wkly. Dig. 326, 17 Fed. Cas. No. 9,794.

cur such reasonable expenses as may be necessary to accomplish the purposes of his employment.<sup>5</sup> A like authority, it would seem, exists in the case of prosecuting officers; and in most jurisdictions such authority is conferred upon these officers by statute.<sup>6</sup> Thus, it has been held that a prosecuting officer may bind his district for the expense of a detective,<sup>7</sup> and an expert witness;<sup>8</sup> but he can only do so to a reasonable extent.<sup>9</sup> In some states such expenses can only be incurred by the consent of the county authorities,<sup>10</sup> or the presiding judge;<sup>11</sup> in others it is held that such expense cannot be incurred in the absence of statutory authority.<sup>12</sup> And even where the right of a prosecuting officer to incur expense is recognized, it has been held that he cannot bind the county by an offer of a reward for the apprehension and conviction of persons who may commit an offense at some future time.<sup>13</sup>

§ 711. **Liability.** — A recovery cannot be had in an action against a prosecuting attorney for damages alleged to have been caused by him in the trial of a criminal case by browbeating, and by an intemperate, vulgar, and unnecessarily severe cross-examination. Conduct of this character, while reprehensible, can only be remedied by proper objections in the trial court, exception, and appeal.<sup>14</sup> Where a prosecuting officer also represents his district, or the state, in civil litigation, his liability will be governed by the principles heretofore stated as to lawyers generally,<sup>15</sup> and the statutes under which he acts.<sup>16</sup> A federal district attorney, while

<sup>5</sup> See *supra*, §§ 252, 310.

<sup>6</sup> *Fish v. U. S.*, 36 Fed. 677; *Yolo County v. Joyce*, 156 Cal. 429, 105 Pac. 125; *Christner v. Hayes County*, 79 Neb. 157, 112 N. W. 347; *People v. Grout*, 38 Misc. 181, 77 N. Y. S. 321.

<sup>7</sup> *People v. Grout*, 38 Misc. 181, 77 N. Y. S. 321.

<sup>8</sup> *People v. Cayuga County*, 22 Misc. 616, 50 N. Y. S. 16; *People v. Cortland County*, 15 N. Y. S. 748.

<sup>9</sup> *People v. Jefferson County*, 35 App. Div. 239, 54 N. Y. S. 782.

<sup>10</sup> *Card v. Dawes County*, 71 Neb. 788, 99 N. W. 662.

<sup>11</sup> *Giboney v. Board of Chosen Freeholders*, 122 Fed. 46, 58 C. C. A. 228 (decided under a New Jersey statute).

<sup>12</sup> *Jones v. Sunflower County*, 84 Miss. 98, 36 So. 188.

<sup>13</sup> *McNeil v. Suffolk County*, 114 App. Div. 761, 100 N. Y. S. 239.

<sup>14</sup> *Ostman v. Bruere*, 141 Mo. App. 240, 124 S. W. 1059.

<sup>15</sup> See *supra*, §§ 284-311, 326-330.

<sup>16</sup> *Gilbert v. Isham*, 16 Conn. 525; *Butts County v. Bloodworth*, 127 Ga. 141, 56 S. E. 106; *Wilson v. State*, 67 Kan. 44, 72 Pac. 517.

liable for money received by him, or lost by his neglect, is not answerable for the fraud or negligence of the marshal.<sup>17</sup>

*Conduct of Trials.*

§ 712. **Prosecutor Must Act Impartially.** — While it is the duty of a prosecuting attorney to use his best endeavor to convict persons guilty of crime, his methods in procuring such conviction must accord with the fair and impartial administration of justice, and he should see that the accused receives a fair trial so far as it is in his power to afford him one.<sup>18</sup> Here, if anywhere upon earth, the benign maxim of the law, that it is better that ninety-nine guilty persons should escape than that one innocent man should be punished, prevails in all its force.<sup>19</sup> The prosecuting attorney is a quasi-judicial officer, and he and those associated with him should represent public justice exclusively, and stand indifferent as between the accused and any private interest;<sup>20</sup> indeed, it has been said that it is as much the duty of prosecuting attorneys to see that the accused is not deprived of any constitutional or statutory rights, as it is to prosecute him for the crime with which he is charged.<sup>1</sup> The district attorney represents the state, and the state does not seek victims—it seeks only equal and impartial justice; and the prosecutor should not press upon the jury any deductions from the evidence that are not strictly legitimate. When he exceeds this limit, and seeks to influence them by appealing to their prejudices, he is no longer an impartial officer, but a partisan.<sup>2</sup> So, private counsel must be guided by his own judgment of the evidence in assenting to the discharge of one accused of crime, even though it be contrary to the oath of his client.<sup>3</sup> The trial court has ample power to protect the defendant

<sup>17</sup> U. S. v. Ingersoll, Crabble 135, 26 Fed. Cas. No. 15,440.

<sup>18</sup> People v. Dane, 59 Mich. 550, 26 N. W. 781.

<sup>19</sup> Shelton v. State, 1 Stew. & P. (Ala.) 208; Com. v. Nicely, 130 Pa. St. 261, 18 Atl. 737; Com. v. Bubnis, 197 Pa. St. 542, 47 Atl. 748.

<sup>20</sup> People v. Bemis, 51 Mich. 422, 16 N. W. 794.

<sup>1</sup> State v. Osborne, 54 Ore. 289, 20 Ann. Cas. 627, 103 Pac. 62.

<sup>2</sup> Com. v. Nicely, 130 Pa. St. 261, 18 Atl. 737; Com. v. Bubnis, 197 Pa. St. 542, 47 Atl. 748.

<sup>3</sup> Rush v. Cavanaugh, 2 Pa. St. 187.

Public prosecutions are carried on by a public officer, the attorney-general, or those who act in his place, and it ought to be a clear case to in-



in his rights, and the presumption is that, if requested, it will do so; and where the prosecuting attorney attempts to take any unfair advantage of the defendant in the course of the trial, the proper practice is to call the attention of the court to that fact;<sup>4</sup> but the prosecutor should not be unduly hampered or embarrassed in conducting the trial.<sup>5</sup> It is improper for the state's counsel to have one who is under arrest brought from the place of arrest to the counsel's office unless the person desires a conference; but, while this practice deserves the censure of the court, it will not be ground for reversal unless it appears that the defendant was injured thereby.<sup>6</sup>

**§ 713. Right of Deputies, Substitutes and Assistants to Conduct Trial.**—Deputy prosecuting attorneys, and duly appointed substitutes and assistants,<sup>7</sup> may conduct the trial of one accused of crime, and, generally, may do any act which the prosecutor himself might do.<sup>8</sup> Thus, they may open and close the

duce gentlemen to engage on behalf of private interests or feelings, in such a prosecution. It ought never to be done against the counsel's own opinion of its merits. Sharswood's Legal Ethics, p. 93.

<sup>4</sup> *People v. Gray*, 251 Ill. 431, 96 N. E. 268; *Goldsberry v. State*, 92 Neb. 211, 137 N. W. 1116.

<sup>5</sup> *Matter of Lyons*, 162 Mo. App. 688, 145 S. W. 844.

<sup>6</sup> *State v. Thavanot*, 225 Mo. 545, 20 Ann. Cas. 1122, 125 S. W. 473.

The day seems to be distant when prosecuting officers will learn that they are not inquisitors, and that it is no part of their duty to endeavor to extort admissions or confessions from one accused of crime. *State v. Hagan*, 164 Mo. 654, 65 S. W. 249.

<sup>7</sup> See *supra*, §§ 695-704.

<sup>8</sup> *Alabama*.—*Donglass v. Prowell*, 130 Ala. 580, 30 So. 498.

*Florida*.—*King v. State*, 43 Fla. 211, 31 So. 254.

*Georgia*.—*Davis v. State*, 11 Ga. App. 10, 74 S. E. 442; *Horton v. State*, 11 Ga. App. 33, 74 S. E. 539.

*Illinois*.—*Lavin v. Cook County*, 245 Ill. 496, 92 N. E. 291.

*Indiana*.—*Choen v. State*, 85 Ind. 209.

*Louisiana*.—*State v. Kirby*, 36 La. Ann. 988; *State v. Montgomery*, 41 La. Ann. 1087, 6 So. 803; *State v. Moeling*, 129 La. 204, 55 So. 764; *State v. Britton*, 131 La. 877, 60 So. 379.

*Massachusetts*.—*Com. v. Gibbs*, 4 Gray 146; *Com. v. Connecticut River R. Co.*, 15 Gray 447.

*Missouri*.—*State v. Wilson*, 200 Mo. 23, 98 S. W. 68; *Appeal of Browne*, 69 Mo. App. 159; *State v. Taylor*, 93 Mo. App. 327, 67 S. W. 672.

*Nebraska*.—*Korth v. State*, 46 Neb. 631, 65 N. W. 792.

case,<sup>9</sup> read the indictment,<sup>10</sup> and examine witnesses;<sup>11</sup> and the defendant cannot complain thereof.<sup>12</sup> But a special prosecuting attorney's powers are confined to the purposes of his appointment.<sup>13</sup>

### § 714. Right of Private Counsel to Conduct Trial.—

In some jurisdictions private counsel<sup>14</sup> may not conduct, in the interest of the state, the trial of one charged with the commission of a crime.<sup>15</sup> In other jurisdictions private counsel may assist the prosecuting attorney; and in some instances such counsel are permitted to read the indictment,<sup>16</sup> conduct the trial,<sup>17</sup> and open and close the case to the jury.<sup>18</sup> But the policy of our system of crim-

*Oklahoma*.—*Canada v. Territory*, 12 Okla. 409, 72 Pac. 375.

*Texas*.—*State v. Lackey*, 35 Tex. 357.

<sup>9</sup> *California*.—*People v. Powell*, 87 Cal. 348, 25 Pac. 481, 11 L.R.A. 75.

*Iowa*.—*State v. Novak*, 109 Ia. 717, 79 N. W. 465.

*Missouri*.—*State v. Stark*, 72 Mo. 37; *State v. Robb*, 90 Mo. 30, 2 S. W. 1; *State v. Coleman*, 199 Mo. 112, 97 S. W. 574; *State v. Boyer*, 232 Mo. 267, 134 S. W. 542.

*Tennessee*.—*Jarnagin v. State*, 10 Verg. 529.

<sup>10</sup> *State v. Chocklett*, (Ia.) 136 N. S. W. 1051.

<sup>11</sup> *State v. Finley*, 245 Mo. 465, 150 S. W. 1051.

<sup>12</sup> *State v. Britton*, 131 La. 817, 60 So. 379.

<sup>13</sup> *State v. Maben*, 5 Okla. Crim. 581, 114 Pac. 1122.

<sup>14</sup> See *supra*, § 702.

<sup>15</sup> *Hayner v. People*, 213 Ill. 142, 72 N. E. 792; *Gilbert v. People*, 121 Ill. App. 423; *State v. Coleman*, 199 Mo. 112, 97 S. W. 574; *State v. Price*, 111 Mo. App. 423, 85 S. W. 922; *Arnold v. State*, 81 Wis. 278, 51 N. W. 426.

*In Wisconsin* private counsel may prosecute an action for assault and battery. *Bartell v. State*, 106 Wis. 342, 82 N. W. 142.

<sup>16</sup> *State v. Crafton*, 89 Ia. 109, 56 N. W. 257; *Galloway v. Com.*, 4 Ky. L. Rep. 720.

<sup>17</sup> *Georgia*.—*Davis v. State*, 11 Ga. App. 15, 74 S. E. 442.

*Louisiana*.—*State v. Mangrum*, 35 La. Ann. 619; *State v. Petrich*, 122 La. 127, 47 So. 438; *State v. Britton*, 131 La. 877, 60 So. 379.

*Mississippi*.—*Byrd v. State*, 1 How. 247; *Carlisle v. State*, 73 Miss. 387, 19 So. 207.

*Texas*.—*Taylor v. State*, 42 S. W. 285.

*Virginia*.—*Jackson v. Com.*, 96 Va. 107, 30 S. E. 452.

<sup>18</sup> *Alabama*.—*Shelton v. State*, 1 Stew. & P. 208.

*California*.—*People v. Strong*, 46 Cal. 302; *People v. Murphy*, 47 Cal. 103.

*Georgia*.—*Dale v. State*, 88 Ga. 552, 15 S. E. 287.

*Idaho*.—*State v. Williams*, 4 Idaho 502, 42 Pac. 511.

*Indiana*.—*Surber v. State*, 99 Ind. 71.

inal jurisprudence requires that the prosecuting attorney, or his duly appointed substitute, should have the active superintendence and management of all criminal trials; and when private counsel are employed and permitted to aid in the prosecution, the official prosecutor should see that the trial does not degenerate into a private persecution, and that the administration of the criminal law is not made a vehicle of oppression for the gratification of private malice, or the accomplishment of private gain or advantage.<sup>19</sup>

### *Compensation.*

§ 715. **Generally.**—The compensation of prosecuting attorneys is provided for by legislation,<sup>20</sup> and is confined to the amount so fixed; thus, it has been held that a contract between a county and a prosecuting attorney, whereby it was agreed to pay such attorney extra compensation for the performance of his official

*Iowa.*—State *v.* Helm, 92 Ia. 540, 61 N. W. 246.

*Kansas.*—State *v.* Smith, 50 Kan. 69, 31 Pac. 784.

*Kentucky.*—Roberts *v.* Com., 94 Ky. 499, 22 S. W. 845; White *v.* Com., 120 Ky. 178, 85 S. W. 753, 27 Ky. L. Rep. 561; Catron *v.* Com., 140 Ky. 61, 130 S. W. 951.

*Pennsylvania.*—Com. *v.* Eisenhower, 181 Pa. St. 470, 37 Atl. 521, 59 Am. St. Rep. 670.

*Utah.*—People *v.* Calton, 5 Utah 451, 16 Pac. 902.

<sup>19</sup> *California.*—People *v.* Blackwell, 27 Cal. 66.

*Florida.*—Thalheim *v.* State, 38 Fla. 169, 20 So. 938.

*Illinois.*—Hayner *v.* People, 213 Ill. 142, 72 N. E. 792.

*Massachusetts.*—Com. *v.* Knapp, 10 Pick. 477, 20 Am. Dec. 534; Com. *v.* Tuck, 20 Pick. 356; Com. *v.* Williams, 2 Cush. 582; Com. *v.* Webster, 5 Cush. 295, 52 Am. Dec. 711; Com. *v.* Gibbs, 4 Gray 146.

*North Dakota.*—State *v.* Kent, 4 N. D. 577, 62 N. W. 631, 27 L.R.A. 686.

*Texas.*—Burkhard *v.* State, 18 Tex. App. 599.

<sup>20</sup> Galpin *v.* Chicago, 159 Ill. App. 135, affirmed 249 Ill. 554, 94 N. E. 961; State *v.* Gilbert, 163 Mo. App. 679, 147 S. W. 505; State *v.* Romero, (N. M.) 125 Pac. 617; Howth *v.* Greer, 40 Tex. Civ. App. 552, 90 S. W. 211; Lattimore *v.* Tarrant County, 57 Tex. Civ. App. 610, 124 S. W. 205.

Laws Mo. 1871-72, p. 13, abolishing the office of circuit attorney except in the county of St. Louis, and fixing the compensation of prosecuting attorneys, is a general law, and does not repeal or modify the Acts of 1865-66, p. 14, and 1869, p. 8, fixing the salary of the circuit attorney of St. Louis county. Folk *v.* St. Louis, 250 Mo. 116, 157 S. W. 71.

*Federal district attorneys'* compensation is provided for by U. S. Rev. Stat. §§ 770, 823, 824, 825, 826, 827 (4 Fed. St. Ann. pp. 88-94).

duties, was void.<sup>1</sup> Nor can a prosecuting attorney recover compensation from third persons for the performance of acts within the scope of his official duty, even though such acts were performed at their request, or though they may have expressly promised to pay therefor.<sup>2</sup> And it has been held that one who accepts the office of prosecuting attorney when no compensation is provided therefor, undertakes to serve gratuitously; <sup>3</sup> but, in such case, a salary subsequently fixed by the legislature will relate back to the time of his induction into office.<sup>4</sup> Nor can a former prosecuting attorney recover compensation for services performed by him through the courtesy of his successor, even though such services consist of attention to unfinished business.<sup>5</sup> In several jurisdictions it is provided by statute that prosecuting officers may not receive any fee or reward for the performance of their official duties, from or on behalf of any private person; <sup>6</sup> and a like prohibition exists as to the payment of deputy, substitute, and assistant prosecuting attorneys.<sup>7</sup> But these provisions do not prevent the employing of a prosecuting attorney to perform duties other than those imposed upon him as an official, and receiving compensation therefor.<sup>8</sup> Thus, it has been held that the county may re-

<sup>1</sup> Cobb v. Scoggin, 85 Ark. 106, 107 S. W. 188; Wilson v. Otoe County, 71 Neb. 435, 98 N. W. 1050; McKenna v. Mellaley, 62 Ore. 1, 123 Pac. 1069.

<sup>2</sup> Cincinnati, S. & C. R. Co. v. Lee, 37 Ohio St. 479; Coggeshall v. Conner, 31 Okla. 113, Ann. Cas. 1913 D 577, 120 Pac. 559, 39 L.R.A.(N.S.) 81.

<sup>3</sup> Coggeshall v. Conner, 31 Okla. 113, Ann. Cas. 1913D 577, 120 Pac. 559, 39 L.R.A.(N.S.) 81.

<sup>4</sup> State v. Romero, (N. M.) 125 Pac. 617.

<sup>5</sup> Davis v. County, 1 Lane. Bar (Pa.) 161.

*As to conflicting claims between the incumbent and his predecessor, see Herrin v. Sharp County, 81 Ark. 33, 98 S. W. 704; Cole v. McKune, 19 Cal. 422; People v. Smyth, 28 Cal. 21; Bartlett v. Brunson, 115 Ga. 459, 41 S.*

*E. 601; Arnsperger v. Norman, 101 Ky. 208, 40 S. W. 574, 19 Ky. L. Rep. 381; Spaulding v. Hill, 115 Ky. 1, 72 S. W. 307, 24 Ky. L. Rep. 1802; Vastine v. Voullaire, 45 Mo. 504; Swayne v. Terrell, 20 Tex. Civ. App. 31, 48 S. W. 218; Flynt v. Jones County, 20 Tex. Civ. App. 641, 50 S. W. 203.*

<sup>6</sup> Bevington v. Woodbury, 107 Ia. 424, 78 N. W. 222; State v. Romero, (N. M.) 125 Pac. 617.

<sup>7</sup> Coggeshall v. Conner, 31 Okla. 113, Ann. Cas. 1913 D 577, 120 Pac. 559, 39 L.R.A.(N.S.) 81.

<sup>8</sup> Lattimore v. Tarrant County, 57 Tex. Civ. App. 610, 124 S. W. 205. See also Jones v. Morgan, 67 Cal. 308, 7 Pac. 734 (contract made during term of office and to be performed after the expiration thereof).

tain the district attorney to attend to the prosecution of causes which, on a change of venue being granted, are moved to another county.<sup>9</sup>

**§ 716. Compensation of Deputies, Substitutes and Assistants.**—In nearly all jurisdictions the compensation of deputy prosecuting attorneys is provided for by statute; so, also, provision is made for the payment of substitute and assistant prosecutors;<sup>10</sup> and it has been held that, in the absence of statutory authority therefor, one appointed as a substitute or assistant prosecuting attorney is not entitled to compensation.<sup>11</sup> The U. S. Rev. Stat. § 365,<sup>12</sup> provides that “no compensation shall hereafter be allowed

<sup>9</sup> *Bevington v. Woodbury County*, 107 Ia. 424, 78 N. W. 222.

<sup>10</sup> *United States*.—Act of May 8, 1896, ch. 252, § 8 (4 Fed. St. Ann. 71).

*Alabama*.—*Banks v. State*, 96 Ala. 41, 11 So. 469; *Trapp v. State*, 120 Ala. 397, 24 So. 1001.

*Arkansas*.—*Goad v. State*, 73 Ark. 458, 84 S. W. 638.

*Colorado*.—*Hinsdale County v. Crump*, 18 Colo. App. 59, 70 Pac. 159.

*Georgia*.—*Mize v. Blalock*, 71 Ga. 861.

*Indiana*.—*Tull v. State*, 99 Ind. 238; *Clay County v. McGregor*, 171 Ind. 634, 17 Ann. Cas. 333, 87 N. E. 1; *Carroll County v. Pollard*, 17 Ind. App. 470, 46 N. E. 1012.

*Iowa*.—*State v. Miller*, 132 Ia. 587, 109 N. W. 1087.

*Michigan*.—*Sneed v. People*, 38 Mich. 248.

*Minnesota*.—*Mathews v. Lincoln County*, 90 Minn. 348, 97 N. W. 101.

*Nebraska*.—*Fuller v. Madison County*, 33 Neb. 422, 50 N. W. 255; *Sands v. Frontier County*, 42 Neb. 837, 60 N. W. 1017.

*New York*.—*People v. Neff*, 191 N. Y. 286, 84 N. E. 63, *affirming* 121

App. Div. 44, 105 N. Y. S. 559; *People v. Genesee County*, 61 App. Div. 545, 15 N. Y. Crim. 463, 70 N. Y. S. 578, *affirmed* without opinion, 168 N. Y. 640, 61 N. E. 1133; *People v. Coler*, 65 App. Div. 217, 72 N. Y. S. 564; *People v. Coler*, 67 App. Div. 619, 73 N. Y. S. 1114, *reversing* 35 Misc. 454, 71 N. Y. S. 127.

*Ohio*.—*State v. Franklin County*, 20 Ohio St. 421; *State v. Wallace*, 24 Ohio St. 597; *State v. Hocking County*, 40 Ohio St. 331; *Geauga County v. Osborn*, 46 Ohio St. 271, 20 N. E. 333; *Fayette County v. State*, 60 Ohio St. 475, 54 N. E. 519; *State v. Moore*, 1 Ohio Dec. (Reprint) 506, 10 West. L. J. 219; *Weldy v. Board of Com'rs*, 8 Ohio Dec. (Reprint) 767, 9 Cine. L. Bul. 313.

*Texas*.—*Harris County v. Stewart*, 91 Tex. 133, 41 S. W. 650.

*Wisconsin*.—*Williams v. Dodge County*, 95 Wis. 604, 70 N. W. 821.

<sup>11</sup> *Kouns v. Draper*, 43 Mo. 225; *Cuming County v. Tate*, 10 Neb. 193, 4 N. W. 1044; *In re Herring*, 10 Kulp (Pa.) 74; *State v. Marshall County*, 14 S. D. 149, 84 N. W. 775.

<sup>12</sup> 4 Fed. Stat. Ann. 87.

to any person, besides the respective district attorneys and assistant district attorneys, for services as an attorney or counselor to the United States, or to any branch or department of the government thereof, except in cases specially authorized by law, and then only on the certificate of the attorney-general that such services were actually rendered, and that the same could not be performed by the attorney-general, or solicitor-general, or the officers of the department of justice, or by the district attorneys." It has been well said that substitute or assistant prosecutors should be paid by the state or a subdivision thereof, for it would, indeed, be a dangerous policy for private parties to employ and pay private counsel, and then have them commissioned by the state as special public prosecutors, and thus, in the name of the state, empowered to wreak vengeance at the instance of private parties.<sup>13</sup>

### *Removal.*

§ 717. **Generally.** — Prosecuting attorneys may be removed from office for official misconduct, or other statutory causes, in the same manner as is provided for the removal of other public officers of the same class.<sup>14</sup> Statutes providing for such removal are penal in character, especially where the cause of removal consists of the commission of a criminal offense, and must be strictly construed;<sup>15</sup> and where a removal is sought because of the commission of criminal offenses, the respondent cannot be required to testify.<sup>16</sup> The charges must be substantiated by at least clear and satisfactory evidence.<sup>17</sup> The statutory method of removal must be followed; the usual method is the presentation of a petition to the court stating cause for removal, and obtaining an order thereon to show cause why the officer should not be removed, upon the

<sup>13</sup> *Coggeshall v. Conner*, 31 Okla. 113, Ann. Cas. 1913 D 577, 120 Pac. 559, 39 L.R.A.(N.S.) 81.

<sup>14</sup> *State v. Hospers*, 147 Ia. 712, Ann. Cas. 1912 B 754, 126 N. W. 818; *State v. Eberhart*, 116 Minn. 313, Ann. Cas. 1913 B 785, 133 N. W. 857, 39 L.R.A.(N.S.) 788; *Graham v. Stein*, 4 Ohio Cir. Dec. 140, 18 Ohio Cir. Ct. 770.

<sup>15</sup> *Tennant v. Kuhlemeier*, 142 Ia. 241, 19 Ann. Cas. 1026, 120 N. W. 689.

<sup>16</sup> *Killits v. State*, 10 Ohio Cir. Dec. 722, 19 Ohio Cir. Ct. 740.

<sup>17</sup> *State v. Hospers*, 147 Ia. 712, Ann. Cas. 1912B 754, 126 N. W. 818.

return of which a hearing may be had in the manner prescribed by statute, or, should the statute be silent on this subject, in the manner provided for similar hearings, or as ordered by the court;<sup>18</sup> and in some instances removal is effected by information in the nature of quo warranto,<sup>19</sup> or by proceedings for impeachment.<sup>20</sup> Where the office is appointive, the power to remove usually lies with the person who has the power of appointment; thus, it has been held that the President may remove a federal district attorney from office before the expiration of his term, and that the appointment and confirmation by the Senate of his successor is a ratification of such removal.<sup>1</sup> But the executive officer of a territory cannot remove a district attorney from office therein in the absence of statutory authority.<sup>2</sup> The order of removal may be reviewed; and, in accordance with the local practice, a writ of error, an appeal, or a writ of certiorari may lie for this purpose.<sup>3</sup> But charges which directly involve the qualifications of a prosecuting officer as a fit person to hold public office, involve also the rights and interests of the public, and the decision of the lower court will not be reversed if there is any legal and substantial evidence tending to support it.<sup>4</sup>

**§ 718. Grounds for Removal.** — A prosecuting attorney may be removed for misfeasance, malfeasance, or nonfeasance.<sup>5</sup> Thus,

<sup>18</sup> *Mills v. Pulaski Cir. Ct. Hardin* (Ky.) 139.

<sup>19</sup> *State v. Foster*, 32 Kan. 14, 765, 3 Pac. 534; *Howard v. Burns*, 14 S. D. 383, 85 N. W. 920.

<sup>20</sup> *Com. v. Rowe*, 112 Ky. 482, 66 S. W. 29, 23 Ky. L. Rep. 1718.

<sup>1</sup> *Parsons v. U. S.*, 30 Ct. Cl. 222.

<sup>2</sup> *Territory v. Mann*, 16 N. M. 211, 114 Pac. 362.

<sup>3</sup> *State v. Eberhart*, 116 Minn. 313, Ann. Cas. 1913 B 785, 133 N. W. 857, 39 L.R.A.(N.S.) 788; *Killits v. State*, 10 Ohio Cir. Dec. 722, 19 Ohio Cir. Ct. 740; *Trigg v. State*, 49 Tex. 643.

<sup>4</sup> *State v. Eberhart*, 116 Minn. 313, Ann. Cas. 1913 B 785, 133 N. W. 857, 39 L.R.A.(N.S.) 788.

<sup>5</sup> *California*.—Ex p. Hayter, 16 Cal. App. 211, 116 Pac. 370.

*Kansas*.—*State v. Foster*, 32 Kan. 14, 765, 3 Pac. 534.

*Kentucky*.—*Com. v. Rowe*, 112 Ky. 482, 66 S. W. 29, 23 Ky. L. Rep. 1718.

*Minnesota*.—*State v. Eberhart*, 116 Minn. 313, Ann. Cas. 1913 B 785, 133 N. W. 857, 39 L.R.A.(N.S.) 788.

*Nevada*.—In re Maestretti, 30 Nev. 187, 93 Pac. 1004.

*Ohio*.—*Graham v. Stein*, 4 Ohio Cir. Dec. 140, 18 Ohio Cir. Ct. 770.

*Texas*.—*Trigg v. State*, 49 Tex. 643.

*That public sentiment* is opposed to the enforcement of a law is no defense to a proceeding for the removal of a prosecuting attorney because of his

he may be removed where it appears that he has accepted a bribe,<sup>6</sup> or acted in the interest of the defendant,<sup>7</sup> or for gross immorality,<sup>8</sup> or general incompetence.<sup>9</sup> So, conviction of crime may be a sufficient ground for removal;<sup>10</sup> but conviction is not essential, even though the alleged cause of removal be the commission of a crime.<sup>11</sup> The fact that a prosecuting officer has been indicted for a criminal offense is not, of itself, sufficient ground for his removal; but that fact may be taken into consideration with other acts of official misconduct in determining whether or not he should be removed.<sup>12</sup> Nor will a removal be ordered because of the prosecutor's ignorance of the law.<sup>13</sup> A certain degree of discretion is confided to the prosecuting attorney in instituting and conducting criminal prosecutions, and he cannot be removed because of his conduct therein, in the absence of an abuse of such discretion, or a clear showing of corruption or incompetence.<sup>14</sup> The moral conviction that the law has been, or is being, violated, in this or that respect, at particular times and places, goes but a little way in making out a case for the removal of one of the officers charged with its enforcement. Such moral conviction should be supplemented by evidence showing that the officer possessed, or with reasonable effort might have obtained, the information and the means

neglect in this respect. *State v. Foster*, 32 Kan. 14, 765, 3 Pac. 534.

<sup>6</sup> *Com. v. Rowe*, 112 Ky. 482, 66 S. W. 29, 23 Ky. L. Rep. 1718.

<sup>7</sup> *Kentucky*.—*Com. v. Thomas*, 9 Ky. L. Rep. 289 (abstract).

*Minnesota*.—*State v. Wedge*, 24 Minn. 150.

*North Dakota*.—*In re Voss*, 11 N. D. 540, 90 N. W. 15.

*Ohio*.—*Graham v. Stein*, 4 Ohio Cir. Dec. 140, 18 Ohio Cir. Ct. 770.

*Texas*.—*Trigg v. State*, 49 Tex. 645.

<sup>8</sup> *Moore v. Strickling*, 46 W. Va. 515, 33 S. E. 274, 50 L.R.A. 279.

<sup>9</sup> *State v. Eberhart*, 116 Minn. 313, Ann. Cas. 1913 B 785, 133 N. W. 857, 39 L.R.A.(N.S.) 788.

<sup>10</sup> *Ex p. Diggs*, 50 Ala. 78.

<sup>11</sup> *Graham v. Stein*, 4 Ohio Cir. Dec. 140, 18 Ohio Cir. Ct. 770.

<sup>12</sup> *State v. Eberhart*, 116 Minn. 313, Ann. Cas. 1913 B 785, 133 N. W. 857, 39 L.R.A.(N.S.) 788.

<sup>13</sup> *State v. Eberhart*, 116 Minn. 313, Ann. Cas. 1913 B 785, 133 N. W. 857, 39 L.R.A.(N.S.) 788.

<sup>14</sup> *State v. Hoppers*, 147 Ia. 712, Ann. Cas. 1912B 754, 126 N. W. 818.

*The Iowa mullet law* (Code, § 2446), providing for the removal of a county attorney who fails to enforce the provisions thereof, refers only to the levy and collection of the mullet tax, and does not contemplate failure to proceed under the prohibitory law. *Tenant v. Kuhlemeier*, 142 Ia. 241, 19 Ann. Cas. 1026, 120 N. W. 689.



required to secure convictions before a court and jury, and that he closed his eyes to his duty and misused or neglected his opportunities.<sup>15</sup> A district attorney is not required to assume the functions of a detective and undertake, personally, to ferret out the facts connected with a crime, or the names of the witnesses thereto.<sup>16</sup>

<sup>15</sup> *State v. Marrero*, 132 La. 109, 61 So. 136.

<sup>16</sup> *State v. Marrero*, 132 La. 109, 61 So. 136.

## CHAPTER XXVIII.

### ATTORNEY-GENERAL.

#### *Generally.*

§ 719. Origin of Office.

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*Control of Litigation.*

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- 752. Dismissal of Suit.
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*Generally.*

§ 719. **Origin of Office.** — The office of attorney-general is of very early origin in England, though the first patent of appointment which can be found seems to be one dated 1472.<sup>1</sup> At common law the attorney-general was the chief representative of the sovereign in the courts, and it was his duty to appear for and prosecute in behalf of the crown any matters—criminal as well as civil. It was said by Mr. Blackstone:<sup>2</sup> “He represents the sovereign, in whose name all criminal processes issue, and his power to prosecute all criminal offenses is unquestioned at common law.” It would seem, therefore, that the attorney-general may exercise common-law powers unless the constitution or statute law, either expressly or by reasonable intendment, forbids the exercise thereof;<sup>3</sup> and under the colonial government the attorney-general received his appointment from the governor of the colony, and exercised his duties under the common law.<sup>4</sup>

§ 720. **In England.** — The office of attorney-general in England is conferred by patent and is held during pleasure.<sup>5</sup> The

<sup>1</sup> 4 Reeves's Hist. Eng. Law, c. 26, p. 151.

<sup>2</sup> 3 Bl. Comm. 27.

<sup>3</sup> People v. Miner, 2 Lans. (N. Y.) 396.

<sup>4</sup> People v. Kramer, 33 Misc. 209, 68 N. Y. S. 383.

<sup>5</sup> 7 Halsbury's Laws of England, p. 72.

attorney-general is a member of the ministry, but not of the cabinet.<sup>6</sup> Thus, he represents the crown for all forensic purposes,<sup>7</sup> and may file an information in the nature of a *quo warranto*,<sup>8</sup> or enter a *nolle prosequi*,<sup>9</sup> enforce and protect public charities, institute proceedings to restrain and abate public nuisances and purpresures, and prevent other public wrongs.<sup>10</sup> He is also summoned to attend the House of Lords at the beginning of every Parliament,<sup>11</sup> and he acts as prosecutor both for the House of Lords and for the House of Commons,<sup>12</sup> and he also performs administrative functions in connection with the grant of letters patent for inventions, the discretion of the crown being exercised through him;<sup>13</sup> and should he be absent or incapacitated, the duties of his office devolve upon the solicitor-general.<sup>14</sup> "The attorney-general is the head of the bar, and has precedence over all king's counsel. Generally speaking, however, he has no greater legal rights than other members of the bar, in so far that he or any person appointed to act for him must conform to the rules of the court in which the proceeding in which he is engaged takes place, the courts exercising over him the same authority which they exercise over every other suitor or his advocate. He would not be permitted to prosecute any proceeding which was merely vexatious, or which had no legal object."<sup>15</sup> But it seems that the court cannot compel the

<sup>6</sup> 7 Halsbury's Laws of England, p. 75.

<sup>7</sup> 7 Halsbury's Laws of England, pp. 71-74. See also *Rex v. Marsden*, 3 Burr. (Eng.) 1812; *Rex v. Wilkes*, 4 Burr. (Eng.) 2570; *Rex v. Austen*, 9 Price (Eng.) 142; *Atty.-Gen. v. Brown*, 1 Swanst. (Eng.) 294. And see Alexander on the Administration of Justice, pp. 127-135.

<sup>8</sup> See *Rex v. Wilkes*, 4 Burr. (Eng.) 2570.

<sup>9</sup> 7 Halsbury's Laws of England, p. 74.

<sup>10</sup> 9 Halsbury's Laws of England, p. 292. See also *Atty.-Gen. v. Sheffield Gas Consumers Co.*, 3 De G. M. & G.

(Eng.) 304; *Atty.-Gen. v. Garner*, [1907] 2 K. B. (Eng.) 480; *Atty.-Gen. v. Cambridge Consumers Gas Co.*, L. R. 4 Ch. (Eng.) 71.

<sup>11</sup> 7 Halsbury's Laws of England, p. 73.

<sup>12</sup> 7 Halsbury's Laws of England, p. 74.

<sup>13</sup> 7 Halsbury's Laws of England, p. 75.

<sup>14</sup> 7 Halsbury's Laws of England, p. 71. See also *Rex v. Wilkes*, 4 Burr. (Eng.) 2527, 2554.

<sup>15</sup> 7 Halsbury's Laws of England, p. 72. See also *Reg. v. Prosser*, 11 Beav. (Eng.) 306, 18 L. J. Ch. 35, 13 Jur. 71.

attorney-general to be examined as a witness;<sup>16</sup> nor can the court review the exercise of his discretion,<sup>17</sup> although prohibition will lie against him.<sup>18</sup> During his occupancy of the office, the attorney-general may not engage in private practice.<sup>19</sup>

**§ 721. In Canada.** — The Dominion attorney-general exercises the same powers and duties which belong to the office of the attorney-general of England, so far as they are applicable to the Dominion of Canada.<sup>20</sup> Proceedings to forfeit a Dominion statutory charter are properly brought by the Dominion attorney-general.<sup>1</sup> So it is he, and not the provincial attorney-general, who must proceed to set aside a patent for an invention.<sup>2</sup>

The provincial attorney-general represents the crown in the provincial courts in respect to provincial rights,<sup>3</sup> and also, in certain cases, in respect to Dominion rights; thus, he may sue on behalf of the public, even in respect of the violation of rights created by an act of the Dominion parliament.<sup>4</sup> So, sums belonging to the Dominion government may be recovered at the suit of the provincial attorney-general.<sup>5</sup> The discretion of the attorney-general is not subject to the control of the court.<sup>6</sup>

### *United States Attorney-General.*

**§ 722. In General.** — The U. S. Rev. Stat., § 346, provides that there shall be at the seat of government an executive depart-

<sup>16</sup> 7 Halsbury's Laws of England, p. 73.

<sup>17</sup> *London County Council v. Atty.-Gen.* [1902] A. C. (Eng.) 165; *Reg. v. Prosser*, 11 Beav. (Eng.) 306, 18 L. J. Ch. 35, 13 Jur. 71; *Ex p. Newton*, 4 El. & Bl. 869, 82 E. C. L. 869, *disapproving dictum* in *Rex v. Wilkes*, 4 Burr. (Eng.) 2551.

<sup>18</sup> 7 Halsbury's Laws of England, p. 71.

<sup>19</sup> 7 Halsbury's Laws of England, p. 72.

<sup>20</sup> See the preceding section.

<sup>1</sup> *Dominion Salvage & Wrecking Co. v. Atty.-Gen.*, 21 Can. Sup. Ct. 72.

<sup>2</sup> *Mousseau v. Bate*, 27 L. C. Jur. 153, 3 Cartw. Cas. 341. But see *Reg. v. Pattee*, 5 Ont. Pr. 292, wherein it was held that a fiat for the writ of scire facias may be granted by the attorney-general of Ontario when the proceeding is on behalf of a private party.

<sup>3</sup> *Atty.-Gen. v. Hargrove*, 11 Ont. L. Rep. 530.

<sup>4</sup> *Atty.-Gen. v. Niagara Falls International Bridge Co.*, 20 Grant Ch. (U. C.) 34, 1 Cartw. Cas. 813.

<sup>5</sup> *Monk v. Ouimet*, 19 L. C. Jur. 71.

<sup>6</sup> *Atty.-Gen. v. Hargrave*, 11 Ont. L. Rep. 530.

ment to be known as the department of justice, and an attorney-general, who shall be the head thereof.<sup>7</sup> It is made the duty of the attorney-general to conduct and argue suits and writs of error and appeals in the Supreme Court, and suits in the Court of Claims in which the United States is interested; and the attorney-general may, whenever he deems it for the interest of the United States, either in person conduct and argue any case in any court of the United States in which the United States is interested, or may direct the solicitor-general or any officer of the department of justice to do so.<sup>8</sup> So, he is obliged to give his advice and opinion upon questions of law, whenever required by the President, or the head of any executive department.<sup>9</sup> The relation between the

<sup>7</sup> 4 Fed. Stat. Annot. 763.

<sup>8</sup> U. S. Rev. Stat., § 359, 4 Fed. St. Ann. 768.

See also *infra*, § 726.

<sup>9</sup> U. S. Rev. Stat. §§ 354, 357, 358, 361 (4 Fed. St. Ann. 766-769).

See also *infra*, § 726.

*The attorney-general's duties* are stated in 6 Op. Atty.-Gen. 326, 347; 5 Am. L. Reg. 65, as follows: "1. Upon the great questions of law arising in the administration of public affairs, he gives opinions officially, both to the President and to the heads of departments.

"2. As one of the confidential political counselors of the President, it may be supposed that he advises more particularly in regard to the legal incidents of the appointments or other acts of the government.

"3. He conducts directly all suits in the Supreme Court in which the United States is concerned.

"4. He advises or directs the solicitor as to suits in which the United States is concerned, pending in the inferior courts of the United States.

"5. He directs and prosecutes appeals in the great questions of land

title, which involve the proprietorship of all the soil in the successive increments of territory acquired by the United States.

"6. He performs occasional duty, from time to time, in the protection of the interests of the United States in matters of adjudication under treaties with foreign powers.

"7. He passes upon the title of all interests in lands acquired by the United States, by purchase, for any of the local uses of government.

"8. He communicates to Congress such information as they require, appertaining to the duties and business of his department.

"In all these particulars he is, either directly or indirectly, and by statute either express or implied, the administrative head, under the President, of the legal business of the government. So far the administrative power and the correspondent administrative responsibility exist, and they require modification in details only in order to be completely adapted to the theory of departmental organization."

attorney-general and any of the departments at whose request he gives advice, or performs other services, is that of attorney and client.<sup>10</sup> The attorney-general also has authority to designate prisons for the confinement of persons convicted in the United States courts, where there is no suitable jail or penitentiary for that purpose in the place of their conviction, and houses of refuge for juvenile offenders.<sup>11</sup> It is also his duty to examine the title to all land purchased by the government for public purposes, and no payment can be made therefor without his certificate as to the validity of the title.<sup>12</sup> But the attorney-general cannot act as arbitrator between the government and a private individual;<sup>13</sup> nor will he exercise appellate jurisdiction over departmental decisions depending upon mixed questions of law and fact.<sup>14</sup>

**§ 723. Superintendence of District Attorneys, Marshals, and Clerks.**—The United States attorney-general exercises general superintendence and direction over district attorneys and marshals as to the manner of discharging their respective duties,<sup>15</sup>

<sup>10</sup> 5 Op. Att.-Gen. 577; 15 Op. Att.-Gen. 574; 20 Op. Att.-Gen. 702; 25 Op. Att.-Gen. 94, 524.

<sup>11</sup> U. S. Rev. Stat., §§ 5546, 5547, 5549, 5550 (6 Fed. St. Ann. pp. 41-47); Ex p. Karstendick, 93 U. S. 395, 23 U. S. (L. ed.) 889; In re Wilson, 18 Fed. 33; U. S. v. Greenwald, 64 Fed. 6.

*Practice.*—"The prevalent practice under these provisions has obtained, in accordance with which the attorney-general notifies the different courts, through the district attorney, of the designation that he has made for the different districts from time to time, and procures to be entered upon the minutes of the courts in each district an order showing the designation which is in force." *Gardes v. U. S.*, 87 Fed. 184.

As to the making of contracts with the authorities of a state or territorial

institution for the confinement of prisoners, see *Lewis County v. U. S.*, 77 Fed. 732; *Avery v. Pima County*, 7 Ariz. 26, 60 Pac. 702.

*Consular Courts.*—Prior to the amendment of U. S. Rev. Stat., § 5546, by Act of March 3, 1901, its provisions were held inapplicable to consular courts (19 Op. Att.-Gen. 377); and the section as so amended has been held not to warrant the confinement in a prison in the Philippine Islands of one convicted in a consular court. 24 Op. Att.-Gen. 549.

<sup>12</sup> U. S. Rev. Stat. 355, 6 Fed. St. Ann. 695; 6 Op. Att.-Gen. 338; *Weed v. U. S.*, 82 Fed. 414. And see 8 Op. Att.-Gen. 405.

<sup>13</sup> 1 Op. Att.-Gen. 209.

<sup>14</sup> 22 Op. Att.-Gen. 342.

<sup>15</sup> U. S. Rev. Stat., § 362; *Confiscation Cases*, 7 Wall. 454, 19 U. S. (L. ed.) 196. And see dictum in U. S.

and he may send a district attorney, or any other officer of the department of justice, to any state or district of the United States to attend to the public interests,<sup>16</sup> or he may direct district attorneys to follow cases on appeal from their own districts into the Circuit Court of Appeals,<sup>17</sup> and he may also employ counsel to assist them to discharge their duties.<sup>18</sup> He may also authorize the district attorney to employ a clerk or stenographer for special purposes.<sup>19</sup> So, the attorney-general has general supervisory powers over the accounts of district attorneys, marshals, clerks, and other officers of the federal courts,<sup>20</sup> and his decision of any point connected with this subject is conclusive, and not subject to collateral attack by the courts;<sup>1</sup> but he has no authority to revise or alter counsel fees allowed to district attorneys by the court pursuant to U. S. Rev. Stat., § 824.<sup>2</sup>

**§ 724. As Counsel for the Government.** — In all cases to which the United States is a party, the government may be heard through the attorney-general; nor can counsel be heard in opposition on behalf of any department of the government; but the court may hear other counsel for the purpose of obtaining the benefit of a full discussion of the matter in hand.<sup>3</sup> It is the uniform practice for the clerk of the Supreme Court to enter the appearance of the attorney-general in all cases to which the

*v. San Jacinto Tin Co.*, 125 U. S. 273, 8 S. Ct. 850, 31 U. S. (L. ed.) 747. See also *Mullan v. U. S.*, 118 U. S. 271, 6 S. Ct. 1041, 30 U. S. (L. ed.) 170.

<sup>16</sup> U. S. Rev. Stat., § 367; *U. S. v. Fleming*, 80 Fed. 372, 49 U. S. App. 354, 25 C. C. A. 498.

*The correspondence between the attorney-general and a district attorney representing the United States is confidential in its nature, and cannot be made available by a third person. U. S. v. Six Lots of Ground*, 1 Woods 234, 27 Fed. Cas. No. 46,299.

<sup>17</sup> *Garter v. U. S.*, 31 Ct. Cl. 344. See also *U. S. v. Hopewell*, 51 Fed. 798, 5 U. S. App. 437, 2 C. C. A. 510.

<sup>18</sup> *Garter v. U. S.*, 31 Ct. Cl. 344.

<sup>19</sup> *McDonald v. U. S.*, 66 Fed. 255, *reversed* on other grounds, 72 Fed. 898, 44 U. S. App. 461, 21 C. C. A. 347; *U. S. v. Denison*, 80 Fed. 370, 49 U. S. App. 352, 25 C. C. A. 496; *Swift v. U. S.*, 128 Fed. 763.

<sup>20</sup> U. S. Rev. Stat., § 368.

<sup>1</sup> *Schloss v. Hewlett*, 81 Ala. 266, 1 So. 263.

<sup>2</sup> *U. S. v. Waters*, 133 U. S. 208, 10 S. Ct. 249, 33 U. S. (L. ed.) 594; *Bird v. U. S.*, 45 Fed. 110; *Hillborn v. U. S.*, 27 Ct. Cl. 547.

<sup>3</sup> *The Gray Jacket*, 5 Wall. 370, 18 U. S. (L. ed.) 646.



United States is a party.<sup>4</sup> The attorney-general may determine when and for what purpose legal proceedings shall be instituted on behalf of the United States, and has the full management and control of such proceedings;<sup>5</sup> and while there is no statute specifically empowering him to bring actions and suits in the name of the United States generally, that power resides in him as the head of the department of justice.<sup>6</sup> Thus, the attorney-general may file a bill in behalf of the government to annul a patent on the ground of fraud or mistake, where the United States has an interest in or is under an obligation in respect to the relief sought.<sup>7</sup> And the court will entertain a bill, to vacate the selection of land by a state, having the signature of the attorney-general subscribed by his authority.<sup>8</sup> So, the attorney-general may intervene on behalf of the United States in a suit between states in which the general government is interested, and may introduce evidence and take part in the argument without making the United States a party for or against whom judgment can be rendered.<sup>9</sup> The attorney-general may also dismiss, compromise, or discontinue suits in which the government is interested,<sup>10</sup> and this is true even as to proceedings brought under a statute which provides that the informer shall share in the proceeds thereof equally with the United States, and notwithstanding the opposition of such informer.<sup>11</sup> But the attorney-general is not authorized to waive the exemption of the United States from judicial process, or to submit the United States or its property to the jurisdiction of the court in a suit brought against its officers.<sup>12</sup>

<sup>4</sup> *Farrar v. U. S.*, 3 Pet. 459, 7 U. S. (L. ed.) 741.

<sup>5</sup> U. S. Rev. Stat. §§ 359, 363, 366. And see *U. S. v. Winston*, 170 U. S. 522, 18 S. Ct. 701, 42 U. S. (L. ed.) 1130.

<sup>6</sup> *U. S. v. San Jacinto Tin Co.*, 125 U. S. 273, 279, 8 S. Ct. 850, 31 U. S. (L. ed.) 747, 749.

<sup>7</sup> *U. S. v. San Jacinto Tin Co.*, 125 U. S. 273, 8 S. Ct. 850, 31 U. S. (L. ed.) 747; *U. S. v. Beebe*, 127 U. S. 338, 8 S. Ct. 1083, 32 U. S. (L. ed.) 121;

*Germania Iron Co. v. U. S.*, 58 Fed. 334, 19 U. S. App. 10, 7 C. C. A. 256.

<sup>8</sup> *U. S. v. Mullan*, 10 Fed. 785.

<sup>9</sup> *Florida v. Georgia*, 17 How. 478, 15 U. S. (L. ed.) 181.

<sup>10</sup> 22 Op. Atty.-Gen. 491; 23 Op. Atty.-Gen. 597.

<sup>11</sup> *Confiscation Cases*, 7 Wall. 454, 19 U. S. (L. ed.) 196.

<sup>12</sup> *Stanley v. Schwalby*, 162 U. S. 255, 16 S. Ct. 754, 40 U. S. (L. ed.) 960.

§ 725. **Opinion of Attorney-General.** — The attorney-general is only required to give his opinion on questions of law; he need not decide questions of fact,<sup>13</sup> although he is not restricted to purely legal questions in advising the President.<sup>14</sup> The weight of evidence and the credibility of witnesses are not questions to be considered by the attorney-general;<sup>15</sup> nor will he give an opinion as to the reasonableness of attorney fees,<sup>16</sup> or as to the advisability of changes in the law,<sup>17</sup> or on hypothetical questions, or those not presently arising.<sup>18</sup> Nor will the attorney-general give an opinion where the question involved is disputable, and is or might be raised in a pending suit,<sup>19</sup> or as to questions which are essentially judicial in character, and properly determinable in court;<sup>20</sup> or as to the laws of a foreign nation.<sup>1</sup> Nor will he examine or approve codes of rules, forms of applications, bonds, etc.<sup>2</sup>

§ 726. **To Whom Opinion Shall Be Given.** — The attorney-general is only required to give his opinion to the President and the heads of governmental departments.<sup>3</sup> He will not give official opinions on matters submitted to him by or for the guidance

<sup>13</sup> 1 Op. Atty.-Gen. 347; 3 Op. Atty.-Gen. 309; 5 Op. Atty.-Gen. 626; 7 Op. Atty.-Gen. 494; Beltzhoover's Claim, 10 Op. Atty.-Gen. 267; Dennistoun's Case, 12 Op. Atty.-Gen. 206; Adair's Claim, 14 Op. Atty.-Gen. 54; Case of Steamboat Joseph Pierce, 14 Op. Atty.-Gen. 541; 18 Op. Atty.-Gen. 487; 19 Op. Atty.-Gen. 672, 696; 20 Op. Atty.-Gen. 253, 384, 459, 487, 494, 530, 590, 614, 697, 740, 742; 21 Op. Atty.-Gen. 96, 129, 133, 240, 255, 260, 454, 594; 23 Op. Atty.-Gen. 231; 25 Op. Atty.-Gen. 183.

<sup>14</sup> Const. U. S., Art. II, § 2, ch. 1; 23 Op. Atty.-Gen. 360.

<sup>15</sup> 21 Op. Atty.-Gen. 58.

<sup>16</sup> 20 Op. Atty.-Gen. 620.

<sup>17</sup> 19 Op. Atty.-Gen. 598.

<sup>18</sup> 9 Op. Atty.-Gen. 421; 10 Op.

Atty.-Gen. 50; 11 Op. Atty.-Gen. 189; 13 Op. Atty.-Gen. 531; 19 Op. Atty.-Gen. 331, 414; 20 Op. Atty.-Gen. 440, 583, 602, 723, 728, 729; 21 Op. Atty.-Gen. 106, 109, 167, 186, 320, 457, 509, 510, 568; 22 Op. Atty.-Gen. 77; 23 Op. Atty.-Gen. 330, 582; 24 Op. Atty.-Gen. 118, 556; 25 Op. Atty.-Gen. 94, 369, 543.

<sup>19</sup> 13 Op. Atty.-Gen. 160; 23 Op. Atty.-Gen. 221.

<sup>20</sup> 19 Op. Atty.-Gen. 56, 671; 20 Op. Atty.-Gen. 210, 277, 314, 524, 539, 673; 21 Op. Atty.-Gen. 369, 557; 22 Op. Atty.-Gen. 181; 24 Op. Atty.-Gen. 69; 25 Op. Atty.-Gen. 97.

<sup>1</sup> 21 Op. Atty.-Gen. 377.

<sup>2</sup> 20 Op. Atty.-Gen. 738.

<sup>3</sup> See *supra*, § 722.

of subordinate officers,<sup>4</sup> but will confine himself to opinions on such questions of law as are needed by the head of a department for the administration thereof.<sup>5</sup> And where an executive order required the attorney-general to give an opinion in cases where the heads of departments and the civil service commission could not agree as to whether an examination was required for a certain position, it was held that no opinion would be given until there had been an actual conference and disagreement.<sup>6</sup>

The attorney-general has no authority, officially, to advise or furnish an opinion to Congress or to congressional committees,<sup>7</sup> even at the request of the head of a department, no question of departmental administration being involved.<sup>8</sup> Nor are private individuals entitled to the official opinion or advice of the attorney-general on matters of private concern, or respecting their rights with regard to the government.<sup>9</sup>

<sup>4</sup> 1 Op. Atty.-Gen. 211; 6 Op. Atty.-Gen. 21; 10 Op. Atty.-Gen. 458; 11 Op. Atty.-Gen. 4; 18 Op. Atty.-Gen. 59; 19 Op. Atty.-Gen. 556; 20 Op. Atty.-Gen. 251, 608, 724; 21 Op. Atty.-Gen. 174.

<sup>5</sup> 10 Op. Atty.-Gen. 220; 19 Op. Atty.-Gen. 7, 695; 20 Op. Atty.-Gen. 50, 158, 178, 312, 383, 420, 500, 536, 588, 714; 21 Op. Atty.-Gen. 6, 219; 25 Op. Atty.-Gen. 584.

*Questions Involving Payments.*—Since the taking effect of the Act of July 31, 1894, c. 174, § 8, providing that "The head of any executive department . . . may apply for, and the comptroller of the treasury shall render his decision upon any question involving a payment to be made by [him] or under [him], which decision . . . shall govern the auditor and the comptroller of the treasury in passing upon the account containing said disbursement," the opinion of the attorney-general should not be asked in such cases except in matters of

great importance. 21 Op. Atty.-Gen. 178, 405, 530; 22 Op. Atty.-Gen. 581; 23 Op. Atty.-Gen. 1, 2, 86, 431, 586; 24 Op. Atty.-Gen. 85, 553; 25 Op. Atty.-Gen. 185, 614.

But if the question is of importance apart from the mere payment involved, the attorney-general will give his official opinion (25 Op. Atty.-Gen. 270), and such decision is binding on the officers of the treasury department. 25 Op. Atty.-Gen. 301.

<sup>6</sup> 25 Op. Atty.-Gen. 492.

<sup>7</sup> 1 Op. Atty.-Gen. 253, 335; 2 Op. Atty.-Gen. 499; 5 Op. Atty.-Gen. 561; 10 Op. Atty.-Gen. 164; 12 Op. Atty.-Gen. 544; 14 Op. Atty.-Gen. 17; 15 Op. Atty.-Gen. 475; 18 Op. Atty.-Gen. 87.

<sup>8</sup> 14 Op. Atty.-Gen. 177; 15 Op. Atty.-Gen. 138; 17 Op. Atty.-Gen. 357.

<sup>9</sup> 1 Op. Atty.-Gen. 492; 6 Op. Atty.-Gen. 147, 335; 9 Op. Atty.-Gen. 355; 10 Op. Atty.-Gen. 122; 20 Op. Atty.-Gen. 463, 465, 607.

§ 727. **Statement of Question.** — A request for the official opinion of the attorney-general should be accompanied by a statement of the material facts of the case.<sup>10</sup> All the facts upon which the question turns should be presented for his consideration,<sup>11</sup> as only such facts as are set forth or admitted, by the head of the department requesting his opinion, will be considered.<sup>12</sup> The request should also state the precise question to be determined,<sup>13</sup> and it should appear that the United States has an interest therein.<sup>14</sup> But these rules may be waived where the public interests require a prompt decision,<sup>15</sup> or where government transactions are involved, and the facts are undisputed.<sup>16</sup>

§ 728. **Effect of Opinion.** — In giving his advice and opinion on questions of law, the attorney-general's duties are quasi-judicial. His opinions are an official interpretation of the law, and in many cases his decision is conclusive, not only with respect to the action of public officers in administrative matters, but also as to many questions which involve private rights, inasmuch as parties having concerns with the government cannot, in many instances, bring a controverted matter before a court of law.<sup>17</sup> Therefore, the opinions of successive attorneys-general have come to constitute a body of legal precedents and exposition, having authority the same in kind, if not the same in degree, with decisions of the courts of justice,<sup>18</sup> and administrative officers should regard them as law until they are withdrawn or overruled by

<sup>10</sup> 9 Op. Att'y-Gen. 82; *Beltzhoover's Claim*, 10 Op. Att'y-Gen. 267; *Dennistoun's Case*, 12 Op. Att'y-Gen. 206; *Gidding's Claim*, 14 Op. Att'y-Gen. 367; 18 Op. Att'y-Gen. 487; 19 Op. Att'y-Gen. 396; 20 Op. Att'y-Gen. 220, 270, 493, 526, 614, 640, 699, 711; 21 Op. Att'y-Gen. 36, 220, 506; 22 Op. Att'y-Gen. 85; 23 Op. Att'y-Gen. 178; 24 Op. Att'y-Gen. 102.

<sup>11</sup> 16 Op. Att'y-Gen. 94.

<sup>12</sup> *Dennistoun's Case*, 12 Op. Att'y-Gen. 206; *Adair's Claim*, 14 Op. Att'y-Gen. 54.

<sup>13</sup> 19 Op. Att'y-Gen. 396; 20 Op. Att'y-Gen. 220, 249, 258, 699, 711; 21 Op. Att'y-Gen. 179, 201; 22 Op. Att'y-Gen. 351, 498; 23 Op. Att'y-Gen. 92, 472; 24 Op. Att'y-Gen. 59.

<sup>14</sup> 2 Op. Att'y-Gen. 311.

<sup>15</sup> *Northern Pac. R. Land Grant*, 21 Op. Att'y-Gen. 486.

<sup>16</sup> 22 Op. Att'y-Gen. 477.

<sup>17</sup> 6 Op. Att'y-Gen. 326, 333, 5 Am. L. Reg. 65.

<sup>18</sup> 6 Op. Att'y-Gen. 326, 334, 5 Am. L. Reg. 65; 21 Op. Att'y-Gen. 264; 24 Op. Att'y-Gen. 55.

the courts.<sup>19</sup> It must be conceded, however, that the attorney-general's opinion is not conclusive—that is, it is not binding on the President, or even on the head of a department;<sup>20</sup> but it is generally safer and better, for departmental heads at least, to adopt it.<sup>1</sup> The attorney-general has no control over the action of the head of a department at whose request and to whom an opinion is given, nor can he with propriety express any judgment concerning the disposition of the matter to which the opinion relates, that being wholly within the administrative sphere of the department.<sup>2</sup>

**§ 729. Substitutes and Assistants.** — It is provided by act of Congress that there shall be in the department of justice an officer learned in the law, to assist the attorney-general in the performance of his duties, called the solicitor-general, who shall be appointed by the President, by and with the advice and consent of the Senate. In case of a vacancy in the office of attorney-general, or of his absence or disability, the solicitor-general shall have power to exercise all the duties of that office.<sup>3</sup> It is also provided that there shall be in the department of justice three officers, learned in the law, called assistant attorneys-general, who shall be appointed by the President, by and with the advice and consent of the Senate, and shall assist the attorney-general and solicitor-general in the performance of their duties;<sup>4</sup> and that to facilitate the speedy disposition of the cases in the Court of Claims, there shall be appointed, in the manner prescribed by law for the appointment of assistant attorneys-general, one additional assistant attorney-general of the United States.<sup>5</sup>

**§ 730. Special Counsel.** — The attorney-general of the United States may employ special counsel to represent the government,

<sup>19</sup> 20 Op. Atty.-Gen. 648, 654, 719.

<sup>20</sup> Des Moines Improvement, 7 Op. Atty.-Gen. 691; Collins' Line of Steamships, 9 Op. Atty.-Gen. 32.

<sup>1</sup> Collins' Line of Steamships, 9 Op. Atty.-Gen. 32.

<sup>2</sup> 17 Op. Atty.-Gen. 332.

<sup>3</sup> U. S. Rev. Stat., § 347 (4 Fed. Stat. Annot. 763).

<sup>4</sup> U. S. Rev. Stat., § 348 (4 Fed. Stat. Annot. 763).

<sup>5</sup> Act March 3, 1891, Ch. 538, 26 Stat. L. 854 (4 Fed. Stat. Annot. 764).

or to assist those on whom this duty regularly devolves,<sup>6</sup> and fix their compensation;<sup>7</sup> and the propriety of employing an attorney for a private party to assist in the prosecution of a suit by the United States, in the public interest, is a question which is addressed to the judgment and discretion of the attorney-general.<sup>8</sup> Where special counsel have been employed, it will be assumed that the statutes authorizing such employment have been complied with.<sup>9</sup> But the attorney-general cannot make an appointment retroactive, so that it will embrace a period prior to the date of the appointment.<sup>10</sup> Nor can he employ a district attorney to perform services in his own district on behalf of the United States, but not pertaining to his office; nor can a district attorney recover compensation from the government for services rendered under such an employment.<sup>11</sup> A special assistant to the attorney-general is not an officer of the department of justice,<sup>12</sup> and his compensation must be confined to the terms of his appointment.<sup>13</sup> He is not entitled to compensation for voluntary services rendered prior to his appointment.<sup>14</sup>

### *State Attorneys-General.*

#### § 731. Appointment, Election, Qualifications, Etc. —

The appointment or election, and the qualification, eligibility, and tenure of office of state attorneys-general are provided for by

<sup>6</sup> U. S. Rev. Stat., §§ 363-366; *U. S. v. Crosthwaite*, 168 U. S. 375, 18 S. Ct. 107, 42 U. S. (L. ed.) 507, *reversing* 30 Ct. Cl. 300; *U. S. v. Winston*, 170 U. S. 522, 18 S. Ct. 701, 42 U. S. (L. ed.) 1130; *U. S. v. Herron*, 170 U. S. 527, 18 S. Ct. 703, 42 U. S. (L. ed.) 1132; *U. S. v. Garter*, 170 U. S. 527, 18 S. Ct. 703, 42 U. S. (L. ed.) 1133, *affirming* 31 Ct. Cl. 344; *Lee v. U. S.*, 45 Ct. Cl. 57.

<sup>7</sup> *Lee v. U. S.*, 45 Ct. Cl. 57.

<sup>8</sup> *U. S. v. Chandler-Dunbar Water Power Co.*, 152 Fed. 25, 81 C. C. A. 221, *affirmed* 209 U. S. 447, 28 S. Ct. 579, 52 U. S. (L. ed.) 881.

That a merchants' association assured the attorney-general that, if necessary, it would furnish funds to compensate a special assistant appointed to investigate frauds in the importation of Japanese silks, does not disqualify an appointee who looks to the United States for compensation. *U. S. v. Rosenthal*, 121 Fed. 862.

<sup>9</sup> *Garter v. U. S.*, 31 Ct. Cl. 344.

<sup>10</sup> *Lee v. U. S.*, 45 Ct. Cl. 57.

<sup>11</sup> *Smith v. U. S.*, 26 Ct. Cl. 568.

<sup>12</sup> *U. S. v. Rosenthal*, 121 Fed. 862; *Lee v. U. S.*, 45 Ct. Cl. 57.

<sup>13</sup> *Lee v. U. S.*, 45 Ct. Cl. 57.

<sup>14</sup> *Lee v. U. S.*, 45 Ct. Cl. 57.

constitutional and statutory provisions in each state, and the local laws must be consulted in this respect. Where the power of appointment is vested in the state legislature, its failure to exercise such power does not vest it elsewhere;<sup>15</sup> and where the mode of filling the office of attorney-general is established by the Constitution, and does not require the approval or concurrence of either branch of the legislature, a substitute attorney-general cannot be appointed by the legislature.<sup>16</sup> In Missouri the attorney-general, and certain other officers, must be male citizens.<sup>17</sup> And in Nevada it was held that a person holding the office of United States district attorney, on the day of election, was incapable of being chosen to the office of attorney-general of the state.<sup>18</sup> In some states the attorney-general may not engage in private practice during the term of office; this, however, is because of constitutional or statutory restrictions, in the absence of which there would seem to be no objection to this practice,<sup>19</sup> excepting, of course, that he may not represent conflicting interests any more than a district attorney,<sup>20</sup> or any other lawyer, may do so.<sup>1</sup>

**§ 732. Common-Law Powers.**—A state attorney-general, in many jurisdictions, may exercise all the common-law powers incident to and inherent in his office, in addition to such authority as may be expressly conferred upon him by the state constitution and general laws.<sup>2</sup> The prerogatives which pertain to the crown

<sup>15</sup> *Collins v. State*, 8 Ind. 344.

<sup>16</sup> *State v. Morris*, Houst. Cr. Cas. (Del.) 124.

<sup>17</sup> *State v. Hostetter*, 137 Mo. 636, 39 S. W. 270, 59 Am. St. Rep. 515, 38 L.R.A. 208.

<sup>18</sup> *State v. Clarke*, 3 Nev. 566.

<sup>19</sup> *Masten v. Indiana Car & Foundry Co.*, 25 Ind. App. 175, 57 N. E. 148.

<sup>20</sup> See *supra*, §§ 693, 700.

<sup>1</sup> See *supra*, §§ 174–182.

<sup>2</sup> *United States*.—*St. Louis & S. F. R. Co. v. Hadley*, 161 Fed. 419.

*California*.—*People v. Oakland Water Front Co.*, 118 Cal. 234, 50 Pac. 305.

*Illinois*.—*Hunt v. Chicago Horse & Dummy R. Co.*, 121 Ill. 638, 13 N. E. 176, *affirming* 20 Ill. App. 282.

*Massachusetts*.—*Parker v. May*, 5 Cush. 336; *Atty.-Gen. v. Williams*, 174 Mass. 476, 55 N. E. 77, 47 L.R.A. 314.

*Minnesota*.—*State v. Robinson*, 101 Minn. 277, 112 N. W. 269, 20 L.R.A. (N.S.) 1127.

*Mississippi*.—*State v. Key*, 93 Miss. 115, 46 So. 75.

*New Hampshire*.—*Fletcher v. Merri-mack County*, 71 N. H. 96, 51 Atl. 271.

*New York*.—*People v. Kramer*, 33 Misc. 209, 68 N. Y. S. 383; *People v. Miner*, 2 Laus. 396.

in England are here vested in the people, and the necessity for the existence of a public officer charged with the protection of public rights and the enforcement of public duties by proper proceedings in the courts of justice is just as imperative here as it is there.<sup>3</sup> Indeed, it has been said that a duty required by the common law is as much a duty required by law as though it were imposed by the express mandate of a statute.<sup>4</sup> So, it has been held that the power of the attorney-general to institute a proceeding for the enforcement of a public charity is a common-law power, incident to the office, and does not depend for its exercise upon the requirement of the governor, or either branch

*West Virginia*.—*State v. Ehrlick*, 65 W. Va. 700, 64 S. E. 935, 23 L.R.A. (N.S.) 691.

In *People v. Miner*, 2 Lans. (N. Y.) 396, Mullin, J., said: "Most, if not all, of the colonies appointed attorneys-general, and they were understood to be clothed with nearly all the powers of the attorneys-general of England; and as these powers have never been defined, we must go back to the common law in order to ascertain them. The attorney-general had the power, and it was his duty:

"1st. To prosecute all actions necessary for the protection and defense of the property and revenues of the crown.

"2d. By information, to bring certain classes of persons accused of crimes and misdemeanors to trial.

"3d. By *scire facias*, to revoke and annul grants made by the crown improperly, or when forfeited by the grantee thereof.

"4th. By information, to recover money or other chattels, or damages for wrongs committed on the land or other possessions of the crown.

"5th. By writ of *quo warranto*, to determine the right of him who claims or usurps any office, franchise, or

liberty, and to vacate the charter or annul the existence of a corporation, for violations of its charter, or for omitting to exercise its corporate powers.

"6th. By writ of *mandamus*, to compel the admission of an officer duly chosen to his office, and to compel his restoration when illegally ousted.

"7th. By information to chancery, to enforce trusts, and to prevent public nuisances and the abuse of trust powers.

"8th. By proceedings *in rem*, to recover property to which the crown may be entitled by forfeiture for treason, and property for which there is no other legal owner, such as wrecks, treasure trove, etc.

"9th. And in certain cases, by information in chancery, for the protection of the rights of lunatics and others who are under the protection of the crown."

<sup>3</sup> *Hunt v. Chicago Horse & Dummy R. Co.*, 20 Ill. App. 282, *affirmed* 121 Ill. 638, 13 N. E. 176. See also *State v. Gleason*, 12 Fla. 225.

<sup>4</sup> *Hunt v. Chicago Horse & Dummy R. Co.*, 20 Ill. App. 282, *affirmed* 121 Ill. 638, 13 N. E. 176.



of the legislature.<sup>5</sup> Of course, the legislature may abridge, alter, or increase the powers of the attorney-general; <sup>6</sup> but the statutory grant of certain powers will not deprive the attorney-general of those belonging to his office at common law, unless the statute either expressly or by reasonable intendment forbade the exercise of powers not thus expressly conferred.<sup>7</sup> Nor will a statute imposing specific duties upon a district attorney, exclude the right of the attorney-general to act with respect thereto, should the public interests require such action; <sup>8</sup> but the legislature cannot impose upon the attorney-general powers which the constitution expressly confers on county and district attorneys.<sup>9</sup> In some states, however, it is held that the powers of an attorney-general are confined to those granted by the constitution and local laws.<sup>10</sup>

**§ 733. Constitutional and Statutory Powers and Duties Generally.** — The constitutions and statutes of the several states regulate and define the powers and duties of attorneys-general, and these are so varied that an examination of the local laws becomes indispensable in most instances.<sup>11</sup> In the absence of proof to the contrary, it is the legal presumption that an attorney-general will do his duty, and that he will act with strict impartiality.<sup>12</sup> Unless it is otherwise provided by the constitution, the legislature may abridge, enlarge, or alter the attorney-general's powers and duties,<sup>13</sup> but it cannot impose upon him a duty which is foreign to the nature of his office, nor is he obliged to perform such duties even though the legislature should prescribe them.<sup>14</sup>

<sup>5</sup> *Parker v. May*, 5 Cush. (Mass.) 336.

<sup>6</sup> *People v. Santa Clara Lumber Co.*, 55 Misc. 507, 106 N. Y. S. 624, reversed on another point 126 App. Div. 616, 110 N. Y. S. 280.

<sup>7</sup> *People v. Miner*, 2 Lans. (N. Y.) 396.

<sup>8</sup> *State v. Robinson*, 101 Minn. 277, 112 N. W. 269, 20 L.R.A. (N.S.) 1127. *Contra State v. Seattle Gas, etc., Co.*,

28 Wash. 488, 68 Pac. 946, 70 Pac. 114.

<sup>9</sup> *State v. Moore*, 57 Tex. 307.

<sup>10</sup> See the following section.

<sup>11</sup> See the following sections of this chapter.

<sup>12</sup> *State v. Gleason*, 12 Fla. 190; *People v. Central Cross-Town R. Co.*, 21 Hun (N. Y.) 476; *People v. Atty.-Gen.*, 22 Barb. (N. Y.) 114.

<sup>13</sup> See the preceding section, note 6.

<sup>14</sup> *Love v. Baehr*, 47 Cal. 364.

In some jurisdictions the common-law authority of the attorney-general<sup>15</sup> is denied, and it is held that he has only such powers as are conferred by the constitution and statutes of the state,<sup>16</sup> and also that his statutory powers cannot be varied or enlarged by usage.<sup>17</sup> Thus, it has been held that a contract made with the attorney-general is void, unless he is expressly or impliedly authorized by statute to make such contract.<sup>18</sup>

**§ 734. Discretion.** — An attorney-general is entitled to exercise his discretion in matters of public concern in many instances, and is not subject to the control of the court in this respect.<sup>19</sup> Thus, as a general rule, the duty of filing an information in the nature of a quo warranto against one holding public office, to inquire into his title to the same, rests upon the attorney-general, and the authority so vested cannot be delegated by him to another, or even cast upon the court.<sup>20</sup> Nor will the supreme court review the discretion of the attorney-general in refusing to file such an information, where it is not clearly abused, or where the proceeding could not benefit the relator.<sup>21</sup> So it has been held that he has the sole power to sue in the name of the state, and on his refusal to do so the governor cannot sue.<sup>1</sup> And while a mandamus will lie to compel the attorney-general to act or decide, the free exercise of his discretion will not be interfered with, and the party injured thereby is left to his remedy by review.<sup>2</sup> So,

<sup>15</sup> See the preceding section.

<sup>16</sup> *Railroad Tax Cases*, 136 Fed. 233 (decided under the laws of Arkansas); *State v. Seattle Gas, etc., Co.*, 28 Wash. 488, 68 Pac. 946, 70 Pac. 114.

<sup>17</sup> *Hord v. State*, 167 Ind. 622, 79 N. E. 916.

<sup>18</sup> *Julian v. State*, 122 Ind. 68, 23 N. E. 690.

<sup>19</sup> *State v. Gleason*, 12 Fla. 190; *State v. Bryan*, 50 Fla. 293, 39 So. 929; *People v. Central Cross-Town R. Co.*, 21 Hun (N. Y.) 476; *People v. Atty.-Gen.*, 22 Barb. (N. Y.) 114; *People v. Fairchild*, 67 N. Y. 334, *af-*

*firmed* 8 Hun 334; *People v. Ballard*, 134 N. Y. 269, 32 N. E. 54, 17 L.R.A. 737, *reversing* 56 Hun 125, 8 N. Y. S. 918; *Candee v. Cunneen*, 92 App. Div. 71, 86 N. Y. S. 723; *Thompson v. Watson*, 48 Ohio St. 552, 31 N. E. 742. See also *State v. Dover*, 9 N. H. 468.

<sup>20</sup> *State v. Bryan*, 50 Fla. 293, 39 So. 929; *Phillips v. Atty.-Gen.*, 167 Mich. 687, 133 N. W. 830.

<sup>21</sup> *People v. Atty.-Gen.*, 41 Mich. 728, 3 N. W. 205.

<sup>1</sup> *Henry v. State*, 87 Miss. 1, 39 So. 856.

<sup>2</sup> *People v. Rosendale*, 76 Hun 103,

the power of the court to compel the attorney-general to grant leave to commence a suit, will be exercised only where an abuse of his discretion is extreme and clearly indefensible.<sup>3</sup> But the official discretion of the attorney-general is not interfered with by restraining him from proceeding with the enforcement of an unconstitutional statute.<sup>4</sup> And in some instances duties are imposed upon the attorney-general with respect to which he has no discretion, and, therefore, the court may compel their performance by mandamus.<sup>5</sup>

**§ 735. Employment of Special Counsel.** — In most jurisdictions the attorney-general is authorized, expressly or impliedly, by statute to employ special counsel to assist him in the performance of certain official duties.<sup>6</sup> The employment of such counsel, in order to bind the state, must be made in the manner, and for the purposes, specified in the statute;<sup>7</sup> and the counsel so employed cannot serve after the expiration of the official term of the attorney-general.<sup>8</sup> The right to employ special counsel does not involve a delegation of power to create a new office.<sup>9</sup>

27 N. Y. S. 837, *affirmed* 142 N. Y. 126, 36 N. E. 806.

<sup>3</sup> *Lamb v. Webb*, 151 Cal. 451, 91 Pac. 102, 646; *Cheetham v. McCormick*, 178 Pa. St. 186, 35 Atl. 631.

<sup>4</sup> *Ex p. Young*, 209 U. S. 123, 14 Ann. Cas. 764, 28 S. Ct. 441, 52 U. S. (L. ed.) 714, 13 L.R.A. (N.S.) 932.

<sup>5</sup> *State v. Berry*, 3 Gil. (Minn.) 190.

<sup>6</sup> *California*.—*Toland v. Ventura County*, 135 Cal. 412, 67 Pac. 498.

*Indiana*.—*State v. Denny*, 67 Ind. 148.

*Kansas*.—*In re Gilson*, 34 Kan. 641, 9 Pac. 763; *State v. Nield*, 4 Kan. App. 626, 45 Pac. 623.

*Kentucky*.—*Rogers v. Bradley*, 100 Ky. 344, 38 S. W. 501, 19 Ky. L. Rep. 114; *Com. v. Louisville Property Co.*, 141 Ky. 731, 133 S. W. 759; *Coutler v. Denny*, 67 S. W. 65, 23 Ky. L. Rep. 1619.

*Louisiana*.—*State v. Russell*, 26 La. Ann. 68.

*Massachusetts*.—*McQuesten v. Atty.-Gen.*, 187 Mass. 185, 72 N. E. 965.

*Mississippi*.—*State v. Mayes*, 28 Miss. 706.

*New York*.—*Kirby v. State*, 68 Misc. 626, 125 N. Y. S. 742.

*South Dakota*.—*State v. Becker*, 3 S. D. 29, 51 N. W. 1018.

*Texas*.—*Terrell v. Sparks*, 104 Tex. 191, 135 S. W. 519.

<sup>7</sup> *Julian v. State*, 122 Ind. 68, 23 N. E. 690; *Atty.-Gen. v. Continental Life Ins. Co.*, 88 N. Y. 572; *People v. Metropolitan Telephone & Telegraph Co.*, 64 How. Pr. (N. Y.) 66, 11 Abb. N. Cas. 304.

<sup>8</sup> *Hord v. State*, 167 Ind. 622, 79 N. E. 916.

<sup>9</sup> *State v. Becker*, 3 S. D. 29, 51 N. W. 1018.

In the absence of statutory authority, it has been held that an attorney-general has no power to employ special counsel at the expense of the state,<sup>10</sup> although it seems that counsel may be permitted to aid him, at his request, without compensation.<sup>11</sup>

**§ 736. Opinion of State Attorney-General.** — In some states it is made the duty of the attorney-general to furnish state officers with an opinion touching their duties,<sup>12</sup> and it has been said that the courts should adhere to the construction given by the attorney-general's department to statutes regulating the compensation of county and district attorneys.<sup>13</sup> So, the rule that the advice of counsel is a complete defense in an action for malicious prosecution,<sup>14</sup> is especially applicable as to a prosecution which was instituted on the advice of the attorney-general of the state.<sup>15</sup> But the official opinion of the attorney-general can constitute no legal justification, in any other respect, for any act done in pursuance of it.<sup>16</sup>

**§ 737. Assistant Attorneys-General.** — Provision is made in practically all states for the appointment of assistants to the attorney-general.<sup>17</sup> Such appointment is not subject to collateral attack,<sup>18</sup> but it will be presumed that it was regularly made, and

<sup>10</sup> *People v. Talmage*, 6 Cal. 256; *Julian v. State*, 122 Ind. 68, 23 N. E. 690; *Julian v. State*, 140 Ind. 581, 39 N. E. 923; *Bradford v. State*, 7 Neb. 109. See also *Hendrick v. Posey*, 104 Ky. 8, 45 S. W. 525, 46 S. W. 702, 20 Ky. L. Rep. 359; *Sims v. Com.*, 116 Ky. 1, 74 S. W. 1097, 25 Ky. L. Rep. 282; *Atty.-Gen. v. Continental Life Ins. Co.*, 88 N. Y. 571.

<sup>11</sup> *Com. v. Knapp*, 10 Pick. (Mass.) 477, 20 Am. Dec. 534.

<sup>12</sup> *Dodd v. State*, 18 Ind. 56.

See *supra*, §§ 725-728, as to the opinion of the federal attorney-general.

<sup>13</sup> *State v. Brady* (Tex.) 114 S. W. 895.

<sup>14</sup> See *supra*, §§ 369-377.

<sup>15</sup> *Gilbertson v. Fuller*, 40 Minn. 413, 42 N. W. 203.

<sup>16</sup> *Dodd v. State*, 18 Ind. 56; *Com. v. Norman*, (Ky.) 50 S. W. 225.

<sup>17</sup> *Hord v. State*, 167 Ind. 622, 79 N. E. 916; *Ray v. James*, (Ky.) 112 S. W. 641; *Townsend v. Oneonta C. & R. S. R. Co.*, 41 Misc. 295, 84 N. Y. S. 117; *Terrell v. Sparks*, 104 Tex. 191, 135 S. W. 519.

<sup>18</sup> *Crawford v. State*, 155 Ind. 692, 57 N. E. 931; *Mikesell v. Wilson County*, 82 Kan. 502, 108 Pac. 829.

the certificate of appointment is *prima facie* sufficient to establish the right of the appointee to represent the state.<sup>19</sup>

§ 738. **Compensation.** — The compensation of attorneys-general is usually fixed by statute under constitutional authority,<sup>20</sup> and where the office is a constitutional one, the legislature cannot usually increase, diminish, or withhold the compensation of the incumbent; but, in the absence of constitutional restriction, it seems that the attorney-general's compensation is subject to legislative regulation even during his term of office.<sup>1</sup> The compensation of deputy, substitute, and assistant attorneys-general is similarly provided for.<sup>2</sup> It is usual to provide that the attorney-general, and his deputies and assistants, shall receive no compensation other than that provided for by the legislature;<sup>3</sup> but it has been held that provisions of this character do not prohibit the attorney-general from recovering certain fees, in the nature of taxable costs, in addition to the salary provided for him.<sup>4</sup> So, it has been held that if an attorney-general chooses to perform services not incumbent on him by virtue of his office, at the bidding of the legislature, it may compensate him therefor, even if the law providing for such compensation be enacted during his term of office.<sup>5</sup>

### *As State Law Officer.*

§ 739. **Appearance for State.** — The attorney-general of a state is its principal law officer. His authority is coextensive with the public legal affairs of the whole community,<sup>6</sup> and it is

<sup>19</sup> State *v.* Jepson, 76 Kan. 644, 92 Pac. 600.

<sup>20</sup> State *v.* Denny, 67 Ind. 148; State *v.* Thompson, 36 Mo. 66; Com. *v.* Field, 84 Va. 26, 3 S. E. 882.

<sup>1</sup> See Blair *v.* Marye, 80 Va. 485; Field *v.* Auditor, 83 Va. 882, 3 S. E. 707.

<sup>2</sup> State *v.* Eggers, 33 Nev. 535, 112 Pac. 699.

<sup>3</sup> Field *v.* Auditor, 83 Va. 882, 3 S.

E. 707; State *v.* Maynard, 35 Wash. 168, 76 Pac. 937.

<sup>4</sup> Chesapeake & O. R. Co. *v.* Com., 100 Ky. 373, 38 S. W. 506, 18 Ky. L. Rep. 828; Hogg *v.* State, 40 Tex. Crim. 109, 48 S. W. 580; Thon *v.* Com., 77 Va. 289.

<sup>5</sup> Love *v.* Baehr, 47 Cal. 364.

<sup>6</sup> Indiana. — Parker *v.* State, 133 Ind. 178, 32 N. E. 836, 33 N. E. 119, 18 L.R.A. 567.

his duty to prosecute or defend all causes, either generally, or in the supreme court of the state, to which the state may be a party.<sup>7</sup> His power to appear for the state before any "tribunal" authorizes him to go before a grand jury.<sup>8</sup> In some jurisdictions the court will not recognize any attorney, other than the attorney-general, as the representative of the people, unless he appears with the consent or approval of the attorney-general;<sup>9</sup> and it has been held that it is the duty of the supreme court, when an adjudication sought will seriously affect the general public, to procure his appearance.<sup>10</sup> So, the attorney-general may appear in an action brought by a private individual against public officers to test the validity of a statute, and wherein the state is merely a

*Louisiana*.—Succession of Fletcher, 12 La. Ann. 498.

*Michigan*.—Babcock v. Hanselman, 56 Mich. 27, 22 N. W. 99; Frey v. Michie, 68 Mich. 323, 36 N. W. 184.

*Montana*.—State v. First Judicial District Court, 22 Mont. 25, 55 Pac. 916.

*Nebraska*.—State v. Fremont, E. & M. V. R. Co., 22 Neb. 313, 35 N. W. 118.

*New York*.—See People v. Kramer, 33 Misc. 209, 68 N. Y. S. 383.

<sup>7</sup>*Alabama*.—Ex p. State, 113 Ala. 85, 21 So. 210.

*California*.—People v. Pacheco, 29 Cal. 210.

*Florida*.—State v. Gleason, 12 Fla. 190, 225.

*Idaho*.—State v. Miles, 11 Idaho 784, 83 Pac. 697.

*Iowa*.—State v. Fleming, 13 Ia. 413; State v. Grimmell, 116 Ia. 596, 88 N. W. 342.

*Kentucky*.—Sims v. Com., 116 Ky. 1, 74 S. W. 1097.

*Louisiana*.—State v. State Bank, 5 Mart. N. S. 327; State v. Hackley, 119 La. 482, 44 So. 272.

*Missouri*.—State v. Zachritz, 166

Mo. 307, 65 S. W. 999, 89 Am. St. Rep. 711. See also St. Louis & S. F. R. Co. v. Hadley, 161 Fed. 419.

*Nebraska*.—State v. Pacific Express Co., 80 Neb. 823, 115 N. W. 619, 18 L.R.A.(N.S.) 664; In re Creighton's Estate, 91 Neb. 654, Ann. Cas. 1913D 128, 136 N. W. 1001.

*Nevada*.—State v. California Min. Co., 13 Nev. 203.

*Ohio*.—State v. Preble County, 6 Ohio Dec. 268.

*South Dakota*.—State v. Marshall County, 14 S. D. 149, 84 N. W. 775.

*Texas*.—State v. Southern Pac. R. Co., 24 Tex. 80.

*Wyoming*.—State v. Cornwell, 14 Wyo. 526, 85 Pac. 977.

<sup>8</sup>Cosson v. Bradshaw, (Ia.) 141 N. W. 1062.

<sup>9</sup>People v. Pacheco, 29 Cal. 210; People v. Navarre, 22 Mich. 1; Babcock v. Hanselman, 56 Mich. 27, 22 N. W. 99; Frey v. Michie, 68 Mich. 323, 36 N. W. 184.

<sup>10</sup>Parker v. State, 132 Ind. 419, 31 N. E. 1114. See also Matter of Co-operative Law Co., 198 N. Y. 479, 19 Ann. Cas. 879, 92 N. E. 15, 139 Am. St. Rep. 839, 32 L.R.A.(N.S.) 55.

nominal party;<sup>11</sup> and he may also appear in an action, even though the state is not a party thereto, if the adjudication thereof might seriously affect the general public;<sup>12</sup> but, in such case, the attorney-general appears as a friend of the court, and not as the representative of either party to the suit,<sup>13</sup> and has only the authority of other *amici curiæ*.<sup>14</sup> His authority ends, of course, with the expiration of his term of office,<sup>15</sup> and his successor may then represent the state without an order of substitution, as his duty to do so is one which pertains to the office and not to the individual.<sup>16</sup> On a contest as to the right of an attorney-general to appear, he is entitled to the same presumptions as are accorded to other lawyers in this respect.<sup>17</sup>

**§ 740. Protection of Public Rights.** — As the representative of the state, an attorney-general is empowered to bring any action which he deems to be necessary for the protection of the public interests.<sup>18</sup> His authority in this respect is necessarily implied

<sup>11</sup> *Parker v. State*, 132 Ind. 419, 31 N. E. 1114.

<sup>12</sup> *Parker v. State*, 132 Ind. 419, 31 N. E. 1114; *Parker v. State*, 133 Ind. 178, 32 N. E. 836, 33 N. E. 119, 18 L.R.A. 567.

<sup>13</sup> *Parker v. State*, 133 Ind. 178, 32 N. E. 836, 33 N. E. 119, 18 L.R.A. 567.

<sup>14</sup> See *supra*, §§ 90, 91.

<sup>15</sup> *Hendrick v. Posey*, 104 Ky. 8, 45 S. W. 525, 46 S. W. 702, 20 Ky. L. Rep. 359.

<sup>16</sup> *Nance v. People*, 25 Colo. 252, 54 Pac. 631; *People v. Carson*, 78 Hun 544, 29 N. Y. S. 619.

<sup>17</sup> *In re Attorney-General*, 3 N. M. 304, 9 Pac. 249. See also *supra*, § 230.

<sup>18</sup> *California*.—*People v. Stratton*, 25 Cal. 242; *People v. Pacheco*, 29 Cal. 210; *People v. Gold Run Ditch & Min. Co.*, 66 Cal. 138, 4 Pac. 1152, 56 Am. Rep. 80; *People v. Sutter St.*

*R. Co.*, 117 Cal. 604, 49 Pac. 736; *People v. Oakland Water Front Co.*, 118 Cal. 234, 50 Pac. 305; *California & Northern R. Co. v. State*, 1 Cal. App. 142, 81 Pac. 971.

*Florida*.—*State v. Gleason*, 12 Fla. 190; *State v. Bryan*, 50 Fla. 293, 39 So. 929.

*Illinois*.—*Atty.-Gen. v. Newberry Library*, 150 Ill. 229, 37 N. E. 236, *affirming* 51 Ill. App. 166; *People v. General Electric R. Co.*, 172 Ill. 129, 50 N. E. 158; *Revell v. People*, 177 Ill. 468, 52 N. E. 1052, 69 Am. St. Rep. 257, 43 L.R.A. 790.

*Indiana*.—*Carr v. State*, 81 Ind. 342.

*Kansas*.—*Wyandotte & K. C. Bridge Co. v. Wyandotte County Com'rs*, 10 Kan. 326.

*Louisiana*.—*State v. Debenture Guarantee & Loan Co.*, 51 La. Ann. 1874, 26 So. 600.

from the nature of his office,<sup>19</sup> and will be presumed to exist, in the absence of evidence to the contrary.<sup>20</sup> Thus, it has been stated that where a public right is invaded, and the authorities whose duty it is to bring an action fraudulently refuse to do so, or no other remedy exists, the attorney-general may sue in his representative capacity, whether the injury affects the whole people,

*Maine*.—Hamlin *v.* Higgins, 102 Me. 510, 67 Atl. 625.

*Massachusetts*.—Atty.-Gen. *v.* Salem, 103 Mass. 138; Atty.-Gen. *v.* Tudor Ice Co., 104 Mass. 239, 6 Am. Rep. 227; Atty.-Gen. *v.* Tarr, 148 Mass. 309, 19 N. E. 358, 2 L.R.A. 87; Atty.-Gen. *v.* Old Colony R. Co., 160 Mass. 62, 35 N. E. 252, 22 L.R.A. 112, 56 Am. & Eng. R. Cas. 59; Atty.-Gen. *v.* Clark, 167 Mass. 201, 45 N. E. 183; Atty.-Gen. *v.* Drohan, 169 Mass. 534, 48 N. E. 279, 61 Am. St. Rep. 301; Atty.-Gen. *v.* Williams, 174 Mass. 476, 55 N. E. 77, 47 L.R.A. 314; Atty.-Gen. *v.* Pitcher, 183 Mass. 513, 67 N. E. 606.

*Michigan*.—Atty.-Gen. *v.* Detroit, 26 Mich. 263; Atty.-Gen. *v.* Evart Booming Co., 34 Mich. 462; Atty.-Gen. *v.* Police Justice, 41 Mich. 224, 2 N. W. 25; Atty.-Gen. *v.* Detroit, 71 Mich. 98, 38 N. W. 714; McMullen *v.* Person, 102 Mich. 608, 61 N. W. 260; Atty.-Gen. *v.* Booth, 143 Mich. 89, 106 N. W. 868.

*Minnesota*.—State *v.* Moriarty, 82 Minn. 68, 84 N. W. 495.

*New Jersey*.—State *v.* Seymour, 69 N. J. L. 606, 55 Atl. 91.

*New York*.—People *v.* New York, 32 Barb. 35, 19 How. Pr. 155; People *v.* Macy, 62 How. Pr. 65; People *v.* Tweed, 13 Abb. Pr. N. S. 25; People *v.* Booth, 32 N. Y. 397; People *v.* Ingersoll, 58 N. Y. 1, 17 Am. Rep. 178, *affirming* 67 Barb. 472; People *v.* Equity Gas Light Co., 141 N. Y. 232, 36

N. E. 194; People *v.* Manhattan Real Estate & Loan Co., 175 N. Y. 133, 67 N. E. 219; People *v.* McClellan, 119 App. Div. 416, 104 N. Y. S. 447.

*North Carolina*.—Atty.-Gen. *v.* Holy Shelter R. Co., 134 N. C. 481, 46 S. E. 959.

*Pennsylvania*.—Cheetham *v.* McCormick, 178 Pa. St. 186, 35 Atl. 631; Com. *v.* State Treasurer, 29 Pa. Co. Ct. 545, 13 Pa. Dist. Ct. 232.

*Rhode Island*.—Greenough *v.* Lucey, 28 R. I. 230, 66 Atl. 300.

*South Carolina*.—State *v.* Corbin, 16 S. C. 533.

*Tennessee*.—State *v.* Red River Turnpike Co., 112 Tenn. 615, 79 S. W. 798.

*Texas*.—State *v.* Farmers' L. & T. Co., 81 Tex. 530, 17 S. W. 60; Moore *v.* Bell, 95 Tex. 151, 66 S. W. 45.

*Washington*.—State *v.* Seattle Gas & Electric Co., 28 Wash. 488, 68 Pac. 946, 70 Pac. 114.

*Wisconsin*.—Atty.-Gen. *v.* Chicago & N. W. R. Co., 35 Wis. 425; Atty.-Gen. *v.* Albion Academy & Normal Inst., 52 Wis. 469, 9 N. W. 391; State *v.* Leischer, 117 Wis. 475, 94 N. W. 299; State *v.* Milwaukee Electric R. & Light Co., 136 Wis. 179, 116 N. W. 900, 18 L.R.A.(N.S.) 672.

<sup>19</sup> State *v.* State Bank, 5 Mart. N. S. (La.) 327.

<sup>20</sup> Nance *v.* People, 25 Colo. 252, 54 Pac. 631. See also *Pennsylvania v.* Wheeling & B. Bridge Co., 13 How. 518, 14 U. S. (L. ed.) 249.



or a limited organization of them, or whether it be a public nuisance, or a corrupt perversion of public money, property or credit.<sup>1</sup> But the attorney-general cannot maintain a suit to prevent or redress private wrongs.<sup>2</sup>

### § 741. Rights Which May Be Protected Generally. —

The state attorney-general has authority to prosecute any action which can be maintained by the state.<sup>3</sup> Thus, he may proceed to annul a patent for lands granted by the state,<sup>4</sup> or to recover state property,<sup>5</sup> or property which has escheated to the state,<sup>6</sup> or money due the state,<sup>7</sup> or penalties,<sup>8</sup> or school funds,<sup>9</sup> or money due on a forfeited recognizance.<sup>10</sup> So, where public rights are involved, the attorney-general may file an information in quo warranto proceedings,<sup>11</sup> or institute proceedings for the protection of easement rights,<sup>12</sup> or to prevent the usurpation or destruction of a public franchise.<sup>13</sup> He may also institute injunction proceedings to restrain conspirators from violating the law,<sup>14</sup> as, for instance, from making contracts which have a tendency to create a monopoly.<sup>15</sup> It has also been held that the attorney-general may institute proceedings for the disbarment of attorneys at law.<sup>16</sup> But a proceeding to obtain a statutory liquor license is not a suit by or against the state.<sup>17</sup>

<sup>1</sup> *People v. Tweed*, 13 Abb. Pr. N. S. (N. Y.) 25.

<sup>2</sup> *Atty.-Gen. v. Salem*, 103 Mass. 138.

<sup>3</sup> *State v. Zachritz*, 166 Mo. 307, 65 S. W. 999, 89 Am. St. Rep. 711.

<sup>4</sup> *State v. Thompson*, 64 Tex. 690.

<sup>5</sup> *State v. Carondelet Canal & Navigation Co.*, 129 La. 279, 56 So. 137.

<sup>6</sup> *Fuhrer v. State*, 55 Ind. 150.

<sup>7</sup> *Succession of D'Aquin*, 9 La. Ann. 400.

<sup>8</sup> *Com. v. Connecticut River R. Co.*, 15 Gray (Mass.) 447. Compare *In re Atty.-Gen.*, Mart. & Y. (Tenn.) 285.

<sup>9</sup> *State v. Meyer*, 63 Ind. 33.

<sup>10</sup> *State v. Schloss*, 92 Ind. 293. Compare *State v. Desforges*, 5 Rob. (La.) 253.

<sup>11</sup> *Wheeler v. Com.*, 98 Ky. 59, 32 S. W. 259; *State v. St. Louis, I. M. & S. R. Co.*, 176 Mo. 718, 75 S. W. 888.

<sup>12</sup> *Atty.-Gen. v. Williams*, 174 Mass. 476, 75 N. E. 77, 47 L.R.A. 314.

<sup>13</sup> *Atty.-Gen. v. Detroit*, 71 Mich. 92, 38 N. W. 714.

<sup>14</sup> *State v. Fagan*, 22 La. Ann. 545.

<sup>15</sup> *In re Davies*, 168 N. Y. 89, 61 N. E. 118, 56 L.R.A. 855, reversing 55 App. Div. 245, 67 N. Y. S. 492.

<sup>16</sup> *Wilson v. Popham*, 91 Ky. 327, 15 S. W. 859; *State v. Mullins*, 129 Mo. 231, 31 S. W. 744; *State v. Harber*, 129 Mo. 271, 31 S. W. 889.

<sup>17</sup> *State v. Gorman*, 171 Ind. 58, 85 N. E. 763.

§ 742. **Enforcement of Public Trusts and Charities.**—The attorney-general is the proper officer to enforce public trusts or charities,<sup>18</sup> and he may file an information either of his own motion or upon the relation of any party concerned for this purpose.<sup>19</sup> The power to institute proceedings of this character existed at common law and is incident to the office.<sup>20</sup> It has been held that the attorney-general should be made a party to an action to enforce a trust left to the selectmen of the town for the support of the gospel therein,<sup>1</sup> and to an action to test the validity of a bequest for charitable purposes,<sup>2</sup> and to an action involving the proper administration of a trust in which the public are interested.<sup>3</sup> And where the beneficiaries are so numerous and indefinite that a breach of the trust cannot be effectively redressed, except by an action in behalf of the people, a court of equity will sustain an information at the suggestion of the attorney-general in behalf of the people.<sup>4</sup> But a bequest of a certain sum for the establishment of a school in a specified locality "for the education of children, to be expended according to the direction of my said executors," is not a bequest for a public charity which may be enforced by the attorney-general.<sup>5</sup>

§ 743. **Abatement of Public Nuisances.**—The attorney-general may proceed for the abatement of a public nuisance, and the fact that such nuisance may also work a private injury is immaterial.<sup>6</sup> Thus, he may maintain an action to compel the re-

<sup>18</sup> *Parker v. May*, 5 Cush. (Mass.) 336; *Jackson v. Phillips*, 14 Allen (Mass.) 539; *Atty.-Gen. v. Garrison*, 101 Mass. 223; *Atty.-Gen. v. Tudor Ice Co.*, 104 Mass. 239, 6 Am. Rep. 227; *In re Creighton's Estate*, 91 Neb. 654, Ann. Cas. 1913D 128, 136 N. W. 1001; *New York Female Ass'n v. Beckman*, 21 Barb. (N. Y.) 565.

<sup>19</sup> *Trustees of Princeton University v. Wilson*, 78 N. J. Eq. 1, 78 Atl. 393.

<sup>20</sup> *Parker v. May*, 5 Cush. (Mass.) 336.

<sup>1</sup> *Orford Union Congregational Soc.*

*v. West Congregational Soc.*, 55 N. H. 463.

<sup>2</sup> *Jackson v. Phillips*, 14 Allen (Mass.) 539.

<sup>3</sup> *Newberry v. Blatchford*, 106 Ill. 584; *Atty.-Gen. v. Newberry Library*, 150 Ill. 229, 37 N. E. 236, *affirming* 51 Ill. App. 166.

<sup>4</sup> *Atty.-Gen. v. Garrison*, 101 Mass. 223.

<sup>5</sup> *Atty.-Gen. v. Soule*, 28 Mich. 153.

<sup>6</sup> *Atty.-Gen. v. Boston Wharf Co.*, 12 Gray (Mass.) 553; *District Attorney v. Lynn & B. R. Co.*, 16 Gray

removal of a wooden shed from a wharf which is used as a highway,<sup>7</sup> or to abate or restrain the erection of a purpresture,<sup>8</sup> or to protect easement rights,<sup>9</sup> or to prevent the erection of a building contrary to an agreement with the state,<sup>10</sup> or to restrain the building or maintenance of projections which will obstruct a passageway.<sup>11</sup>

§ 744. **Collection and Assessment of Taxes.** — It would seem that the attorney-general may take such proceedings as are necessary for the collection and enforcement of state taxes, especially where that duty has not been delegated to any other public officer.<sup>12</sup> In Texas it is provided by statute that the attorney-general, upon the request of the comptroller, must sue in the name of the state for taxes imposed on railroad corporations, express companies, etc.<sup>13</sup> But authority to attend all cases in which the state is interested, and to investigate the conditions of unsatisfied claims due the state, and take all necessary steps to collect the same, does not warrant the attorney-general in prosecuting a suit to compel the listing of property for taxation purposes.<sup>14</sup>

§ 745. **Suits by or against State Officers.** — In many jurisdictions the state attorney-general is expressly designated as the attorney for state officers generally, and it would seem that he should represent them, even in the absence of statutory regulation, in actions brought by or against them in an official capacity,<sup>15</sup>

(Mass.) 242; *Atty.-Gen. v. Cambridge*, 16 Gray (Mass.) 247; *State v. Vandalia*, 119 Mo. App. 406, 94 S. W. 1009; *Com. v. State Treasurer*, 29 Pa. Co. Ct. 545, 13 Pa. Dist. Ct. 232. See also *Atty.-Gen. v. Albion Academy*, 52 Wis. 469, 9 N. W. 391.

<sup>7</sup> *People v. Macy*, 62 How. Pr. (N. Y.) 65.

<sup>8</sup> *People v. Vanderbilt*, 26 N. Y. 287, *affirming* 38 Barb. 282, 24 How. Pr. 301.

<sup>9</sup> *Atty.-Gen. v. Williams*, 174 Mass. 476, 55 N. E. 77, 47 L.R.A. 314.

<sup>10</sup> *Atty.-Gen. v. Gardiner*, 117 Mass. 492.

<sup>11</sup> *Atty.-Gen. v. Williams*, 140 Mass. 329, 2 N. E. 80, 3 N. E. 214, 54 Am. Rep. 468.

<sup>12</sup> *State v. Central Pac. R. Co.*, 10 Nev. 47.

<sup>13</sup> *Brady v. Brooks*, 99 Tex. 366, 89 S. W. 1052.

<sup>14</sup> *Com. v. Southern Pac. Co.*, 127 Ky. 358, 105 S. W. 466, 32 Ky. L. Rep. 259, 285.

<sup>15</sup> *People v. State University*, 24 Colo. 175, 49 Pac. 286; *Nance v. Peo-*

unless, under the laws of the state, they are entitled to employ counsel themselves.<sup>16</sup> Thus, the attorney-general may represent state officers in mandamus proceedings.<sup>17</sup> So, he may bring suit for the recovery of money or property owing to the state by any of its officers,<sup>18</sup> or on the state treasurer's bond;<sup>19</sup> and, in some jurisdictions, he may also sue to restrain state officers from acting under an unconstitutional statute.<sup>20</sup>

**§ 746. Suits by or against Municipal or Quasi-Municipal Corporations, etc.** — Ordinarily the state attorney-general will not interfere in the management of municipal or quasi-municipal corporations, and this is especially true as to matters which are merely technical or unimportant.<sup>1</sup> Thus, it has been held that the attorney-general cannot enjoin the issuance of town bonds,<sup>2</sup> or maintain a suit to restrain the unauthorized tearing up of street pavements, where the municipal authorities have ample power to protect themselves thereagainst;<sup>3</sup> nor can the attorney-general restrain one from taking possession of property owned by a municipality.<sup>4</sup> So, it has been held that the attorney-general cannot restrain a county treasurer from collecting taxes for the payment of bonds issued by a school district,<sup>5</sup> or maintain an

ple, 25 Colo. 252, 54 Pac. 631; *Orton v. State*, 12 Wis. 509.

<sup>16</sup> *The New York forest, fish, and game commission* may employ special counsel to represent them in certain proceedings, and the attorney-general has no right to be substituted in the place of the counsel so selected. *People v. Santa Clara Lumber Co.*, 126 App. Div. 616, 110 N. Y. S. 280, 60 Misc. 150, 113 N. Y. S. 70.

<sup>17</sup> *Nance v. People*, 25 Colo. 252, 54 Pac. 631; *Jennings v. State Veterinary Board*, 156 Mich. 417, 120 N. W. 785, 16 Detroit Leg. N. 101; *State v. Osakis*, 112 Minn. 365, 128 N. W. 295.

<sup>18</sup> *Moore v. State*, 55 Ind. 360; *State v. Denny*, 67 Ind. 148; *Carr v. State*, 81 Ind. 342; *State v. Marion County*, 85 Ind. 489; *State v. Schloss*,

92 Ind. 293; *Tippecanoe County v. State*, 92 Ind. 353; *State v. McClelland*, 138 Ind. 395, 37 N. E. 799; *Crawford v. State*, 155 Ind. 692, 57 N. E. 931.

<sup>19</sup> *Miller v. State*, 69 Miss. 112, 12 So. 265; *State v. Welbes*, 11 S. D. 86, 75 N. W. 820.

<sup>20</sup> *State v. Cunningham*, 81 Wis. 440, 51 N. W. 724, 15 L.R.A. 561.

<sup>1</sup> *Atty.-Gen. v. Detroit*, 26 Mich. 263; *Atty.-Gen. v. Detroit*, 55 Mich. 181, 20 N. W. 894.

<sup>2</sup> *People v. Miner*, 2 Lans. (N. Y.) 396.

<sup>3</sup> *People v. Equity Gas Light Co.*, 141 N. Y. 232, 36 N. E. 194.

<sup>4</sup> *People v. Booth*, 32 N. Y. 397.

<sup>5</sup> *State v. McLaughlin*, 15 Kan. 228, 22 Am. Rep. 264.

action, in behalf of the people, to recover money fraudulently drawn from a county treasury.<sup>6</sup> In some jurisdictions, however, the attorney-general is vested with certain authority over affairs of this character; thus, he may represent a county on appeal, unless its interests are adverse to those of the state or some officer thereof.<sup>7</sup> So, it has been held that the attorney-general may restrain county officers from issuing certain bonds,<sup>8</sup> or from exercising inhibited powers.<sup>9</sup> And in some jurisdictions the attorney-general may proceed for the removal of certain municipal officers under statutory authority.<sup>10</sup>

**§ 747. Suits by or against Private Corporations.**—The state attorney-general is frequently authorized to inquire into the affairs of private corporations.<sup>11</sup> Thus, he may proceed to prevent such corporations from exercising, or assuming to exercise, a franchise not conferred by law, and which is detrimental to the public interests;<sup>12</sup> and it has been said that such authority exists from the nature of his office, even in the absence of statutory regulation;<sup>13</sup> for instance, he may appear on behalf of the state, and participate in the argument of a case involving the right of a corporation to practice law.<sup>14</sup> In some jurisdictions the attorney-general may maintain an action for the dissolution of corporations,<sup>15</sup> notwithstanding the pendency of proceedings for its voluntary dissolution.<sup>16</sup> But he is not bound to proceed by quo

<sup>6</sup> *People v. Ingersoll*, 58 N. Y. 1, 17 Am. Rep. 178, *affirming* 67 Barb. 472.

<sup>7</sup> *Corker v. Elmore County*, 11 Idaho 787, 84 Pac. 509.

<sup>8</sup> *McMullen v. Ingham Circuit Judge*, 102 Mich. 608, 61 N. W. 260.

<sup>9</sup> *Taggart v. Board of Auditors of Wayne County*, 73 Mich. 53, 40 N. W. 852.

<sup>10</sup> *State v. Robinson*, 101 Minn. 277, 112 N. W. 269.

<sup>11</sup> *State v. Southern R. Co.*, 82 S. C. 12, 62 S. E. 1116.

<sup>12</sup> *Atty.-Gen. v. Moliter*, 26 Mich. 444; *State v. International & G. N. R. Co.*, 89 Tex. 562, 35 S. W. 1067. See also *State v. Paris R. Co.*, 55 Tex. 76.

<sup>13</sup> See dissenting opinion of Whitfield, C. J., in *Henry v. State*, 87 Miss. 98, 39 So. 856.

<sup>14</sup> *Matter of Co-operative Law Co.*, 198 N. Y. 479, 19 Ann. Cas. 879, 92 N. E. 15, 139 Am. St. Rep. 839, 32 L.R.A.(N.S.) 55.

<sup>15</sup> *People v. Manhattan Real Estate & Loan Co.*, 175 N. Y. 133, 67 N. E. 219, *reversing* 74 App. Div. 535, 77 N. Y. S. 837. Compare *State v. Milwaukee Electric R. & Light Co.*, 136 Wis. 179, 116 N. W. 900, 18 L.R.A.(N.S.) 672.

<sup>16</sup> *People v. Murray Hill Bank*, 10 App. Div. 328, 41 N. Y. S. 804.

warranto for the forfeiture of the charter of a corporation which has exceeded its power; he may proceed, instead, to enjoin it from so acting.<sup>17</sup> It is also provided, in some states, that the corporation commission, whenever in its judgment any corporation has violated a law, shall first give notice of such violation to the offending corporation, and, in the event of a failure of the corporation to comply with the law, shall forthwith present the facts to the attorney-general, who shall take such proceedings thereon as he may deem expedient; and such provisions are held to be mandatory.<sup>18</sup> So, also, under some statutes, the attorney-general is required to institute proceedings to prohibit the issuance of corporate stock for less than its par value.<sup>19</sup> The state attorney-general is also charged with the enforcement of the railroad rate laws in many instances;<sup>20</sup> but it seems that he has no power to intervene in cases of this character without statutory authority.<sup>1</sup>

§ 748. **Necessity of Request to Act for State.** — As a general rule, the attorney-general, as the chief law officer of the state, may act on his own judgment and discretion, in behalf of the state, either in instituting, appearing in, or defending litigation wherein the state is interested.<sup>2</sup> But in some jurisdictions, for certain purposes at least, the attorney-general can only act on behalf of the state on the request of the governor or legislature thereof,<sup>3</sup> or with the consent of the court.<sup>4</sup> Where such request

<sup>17</sup> *Chicago Fair Grounds Assoc. v. People*, 60 Ill. App. 488; *Atty.-Gen. v. Chicago & N. W. R. Co.*, 35 Wis. 425.

<sup>18</sup> *Southern R. Co. v. McNeill*, 155 Fed. 756 (decided under the laws of North Carolina). See also *Ex p. Young*, 209 U. S. 123, 14 Ann. Cas. 764, 28 S. Ct. 441, 52 U. S. (L. ed.) 714, 13 L.R.A.(N.S.) 932.

<sup>19</sup> *Cheatham v. McCormick*, 178 Pa. St. 186, 35 Atl. 631.

<sup>20</sup> *Ex p. Young*, 209 U. S. 123, 14 Ann. Cas. 764, 28 S. Ct. 441, 52 U. S. (L. ed.) 714, 13 L.R.A.(N.S.) 932; *Southern R. Co. v. McNeill*, 155 Fed. 756; *State v. Fremont, E. & M. V. R.*

*Co.*, 22 Neb. 313, 35 N. W. 118; *State v. Pacific Exp. Co.*, 80 Neb. 823, 115 N. W. 619, 18 L.R.A.(N.S.) 664; *Moore v. Bell*, 95 Tex. 151, 66 S. W. 45.

<sup>1</sup> *Railroad Tax Cases*, 136 Fed. 233.

<sup>2</sup> *Atty.-Gen. v. Holly Shelter R. Co.*, 134 N. C. 481, 16 S. E. 959. See also the preceding section of this subdivision.

<sup>3</sup> *Atchison, T. & S. F. R. Co. v. People*, 5 Colo. 60; *In re Creighton's Estate*, 91 Neb. 654, Ann. Cas. 1913D 128, 136 N. W. 1001; *State v. Huston*, 21 Okla. 782, 97 Pac. 982.

<sup>4</sup> *People v. Bleecker St. & F. F. R.*

or consent is necessary, voluntary action on the part of the attorney-general will not bind the state,<sup>5</sup> excepting, possibly, where his acts are subsequently ratified.<sup>6</sup> On the other hand, where the attorney-general has been requested to act by the proper authorities, it would seem that he has no discretion in the matter.<sup>7</sup>

§ 749. **Pleadings.**—The attorney-general, when acting in behalf of the state, is bound by his pleadings, for practical purposes at least, as any other lawyer would be.<sup>8</sup> In prosecuting an action it is essential that the bill, petition or complaint should set forth a good cause,<sup>9</sup> based on a public grievance.<sup>10</sup> And when the action is one that can only be commenced on the request, or with the consent, of others,<sup>11</sup> such request or consent must be alleged and proved.<sup>12</sup> The attorney-general may bring an action on his own information,<sup>13</sup> and, consequently, an allegation to the effect that such action is brought on the information of another may be rejected as surplusage,<sup>14</sup> excepting, possibly, where the action is brought for the purpose of benefiting such other person.<sup>15</sup> And where the attorney-general fails to maintain an information, he cannot then contend that the relator is an orator, and the information a bill, and ask that the relief prayed for be granted the orator.<sup>16</sup> An information by the attorney-general *ex officio* is equivalent to a bill in chancery verified on information and belief, and in proper cases calls for a verified answer;<sup>17</sup> but a temporary injunction will not usually issue upon such an informa-

Co., 140 App. Div. 611, 125 N. Y. S. 1045, *affirming* judgment 67 Misc. 577, 124 N. Y. S. 782.

<sup>5</sup> *New Orleans & C. R. Co. v. New Orleans*, 34 La. Ann. 429; *Ex p. Dunn*, 8 S. C. 207.

<sup>6</sup> See *supra*, §§ 211–214.

<sup>7</sup> *Emery v. State*, 101 Wis. 646, 78 N. W. 145.

<sup>8</sup> *Martin v. Com.*, 1 Mass. 347.

<sup>9</sup> *State v. Lancaster County Bank*, 8 Neb. 218.

<sup>10</sup> *Atty.-Gen. v. Evart Booming Co.*, 34 Mich. 462.

<sup>11</sup> See the preceding section.

<sup>12</sup> *People v. Bleecker St. & F. F. R. Co.*, 140 App. Div. 611, 125 N. Y. S. 1045, *affirmed* 201 N. Y. 594, 95 N. E. 1136.

<sup>13</sup> *People v. Loew*, 26 Civ. Proc. 132, 19 Misc. 248, 44 N. Y. S. 42.

<sup>14</sup> *People v. Loew*, 19 Misc. 248, 26 Civ. Proc. 132, 44 N. Y. S. 42.

<sup>15</sup> *People v. Metropolitan Bank*, 7 How. Pr. (N. Y.) 144.

<sup>16</sup> *Atty.-Gen. v. Evart Booming Co.*, 34 Mich. 462.

<sup>17</sup> *Atty.-Gen. v. Chicago & N. W. R. Co.*, 35 Wis. 425.

tion, unsupported by affidavit, until the defendant has had an opportunity to contradict it on oath and has failed to do so.<sup>18</sup>

**§ 750. Costs and Expenses.** — As a general rule, the attorney-general is not liable for costs in a suit brought in his official capacity on behalf of the state,<sup>19</sup> and should such costs be taxed against him, the state will be liable therefor.<sup>20</sup> It would seem also that the attorney-general might incur such expense as is reasonably necessary for the purpose of carrying on litigation in which he is engaged on behalf of the state;<sup>1</sup> but it has been held that he may not engage an expert witness.<sup>2</sup>

### *Control of Litigation.*

**§ 751. State Litigation under Control of Attorney-General.** — Where it becomes the duty of the attorney-general to represent the state in litigation, he has entire control of the proceeding; and neither the governor nor any other officer of the state can interfere with such control,<sup>3</sup> in the absence of statutory authority.<sup>4</sup> Thus, it has been held that the attorney-general may appeal from a judgment taken by consent of the district attorney,<sup>5</sup> or where the district attorney declines to act.<sup>6</sup> So, the attorney-general may waive his right to an appeal, by stipulation with counsel for the adverse party, should he consider it advisable to do so.<sup>7</sup> And, as a rule, the attorney-general has power, both under the common law and by statute, to make any disposi-

<sup>18</sup> *Atty.-Gen. v. Chicago & N. W. R. Co.*, 35 Wis. 425.

<sup>19</sup> *Atty.-Gen. v. Illinois Agricultural College*, 85 Ill. 516; *State v. Marion County*, 85 Ind. 489.

<sup>20</sup> *State v. Marion County*, 85 Ind. 489; *Henderson v. State*, 96 Ind. 437.

<sup>1</sup> See *supra*, § 252.

<sup>2</sup> *Ritchie v. State*, 42 Wash. 653, 85 Pac. 417.

<sup>3</sup> *Fletcher's Succession*, 12 La. Ann. 498; *State v. Dubuclet*, 27 La. Ann. 29; *Henry v. State*, 87 Miss. 1, 39 So. 856; *State v. Fremont, E. & M. V. R.*

*Co.*, 22 Neb. 313, 35 N. W. 118; *State v. California Min. Co.*, 13 Nev. 203; *State v. Southern R. Co.*, 82 S. C. 12, 62 S. E. 1116.

<sup>4</sup> *State v. Ehrlick*, 65 W. Va. 700, 64 S. E. 935, 23 L.R.A. (N.S.) 691.

<sup>5</sup> *Sacramento County v. Central Pac. R. Co.*, 61 Cal. 250.

<sup>6</sup> *State v. Sheriff*, 45 La. Ann. 162, 12 So. 189.

<sup>7</sup> See also *State v. Echeveria*, 33 La. Ann. 709; *People v. Stephens*, 52 N. Y. 306.



tion of the state's litigation that he deems for its best interest;<sup>8</sup> for instance, he may abandon,<sup>9</sup> discontinue,<sup>10</sup> dismiss,<sup>11</sup> or compromise it.<sup>12</sup> But he cannot enter into any agreement with respect to the conduct of litigation which will bind his successor in office,<sup>13</sup> nor can he empower any other person to do so.<sup>14</sup>

The authority of lawyers generally in the conduct of litigation has been considered heretofore.<sup>15</sup>

**§ 752. Dismissal of Suit.**—The attorney-general may dismiss any suit or proceeding, prosecuted solely in the public interest, regardless of the relator's wishes;<sup>16</sup> and it has been so held with reference to an action brought in the name of the people for the forfeiture of a corporation charter.<sup>17</sup> But the situation is different as to cases which also involve an adjudication of the relator's rights, and it has been held that these cannot be dismissed by the attorney-general to the prejudice of the relator;<sup>18</sup> and this is particularly true where the state has no direct interest in the event of the suit.<sup>19</sup> For instance, it has been held that the

<sup>8</sup> *Hunt v. Chicago Horse & D. R. Co.*, 121 Ill. 638, 13 N. E. 176.

<sup>9</sup> *People v. Central Cross-Town R. Co.*, 21 Hun (N. Y.) 476.

<sup>10</sup> *People v. Central Cross-Town R. Co.*, 21 Hun (N. Y.) 476.

<sup>11</sup> See the following section.

<sup>12</sup> See *infra*, § 753.

<sup>13</sup> *People v. Sutter St. R. Co.*, 117 Cal. 604, 49 Pac. 736; *State v. Graham*, 25 La. Ann. 433; *People v. McClellan*, 118 App. Div. 177, 103 N. Y. S. 146, *affirmed* 188 N. Y. 618, 81 N. E. 1171.

<sup>14</sup> *People v. Mutual Union Tel. Co.*, 2 McCarty Civ. Proc. (N. Y.) 295.

<sup>15</sup> See *supra*, §§ 246-275.

<sup>16</sup> *People v. Spring Lake Drainage & Levee Dist.*, 253 Ill. 479, 97 N. E. 1042; *People v. Central Cross-Town R. Co.*, 21 Hun (N. Y.) 476; *People v. Tobacco Mfg. Co.*, 42 How. Pr. (N. Y.) 162; *State v. Southern R.*

*Co.*, 82 S. C. 12, 62 S. E. 1116; *State v. Red River Turnpike Co.*, 112 Tenn. 615, 79 S. W. 798.

<sup>17</sup> *People v. Tobacco Mfg. Co.*, 42 How. Pr. (N. Y.) 162.

*Compare* *Mechanics' Fire Ins. Co.'s Case*, 5 Abb. Pr. (N. Y.) 444, holding that the attorney-general cannot, without the consent of the controller, discontinue proceedings to dissolve an insurance company for alleged insufficiency of assets.

<sup>18</sup> *People v. North San Francisco Homestead & R. Assoc.*, 38 Cal. 564; *People v. Clark*, 72 Cal. 289, 13 Pac. 858; *People v. Jacob*, (Cal.) 12 Pac. 222; *Atty.-Gen. v. Wallace*, 7 B. Mon. (Ky.) 611; *Atty.-Gen. v. Barstow*, 4 Wis. 567. See also *Duke v. State*, 56 Ark. 485, 20 S. W. 600.

<sup>19</sup> *People v. North San Francisco Homestead & R. Assoc.*, 38 Cal. 564; *People v. Jacob*, (Cal.) 12 Pac. 222.

attorney-general may not dismiss an information to enforce a charitable bequest, where the control of the cause, and the liability for costs, rest upon another.<sup>20</sup> And while an information in the nature of *quo warranto*, which has been filed by the attorney-general upon the relation of one who claims an office, may be dismissed so far as the public is concerned therein, the relator may be allowed to prosecute the suit in his own behalf.<sup>1</sup>

**§ 753. Compromise.** — It has been stated heretofore that attorneys generally have no implied authority to compromise litigation undertaken by them for their clients,<sup>2</sup> and the rule is the same with respect to litigation conducted by the attorney-general for the state;<sup>3</sup> nor will the state be bound by such a settlement.<sup>4</sup> Thus, it has been held that the state will not be bound by the acquiescence of the attorney-general in an adverse judgment.<sup>5</sup> Of course, the attorney-general may be authorized to compromise the state's litigation, and, in such case, the compromise will be effective.<sup>6</sup> Where it is desired to compromise, and no express authority to do so exists, the proper practice seems to be to continue the case, having the court's permission, of course, and to submit the terms of settlement to the legislature.<sup>7</sup>

### *Criminal Prosecutions.*

**§ 754. Authority to Conduct Criminal Trials.** — As a rule, the state attorney-general does not conduct the trial of criminal cases,<sup>8</sup> as litigation of this character falls within the duties of prosecuting attorneys,<sup>9</sup> over whom the attorney-general has cer-

<sup>20</sup> *Atty.-Gen. v. Wallace*, 7 B. Mon. (Ky.) 611.

<sup>1</sup> *Atty.-Gen. v. Barstow*, 4 Wis. 567.

<sup>2</sup> See *supra*, § 215. And as to authority with respect to compromise and release generally, see *supra*, §§ 215, 228.

<sup>3</sup> *Duke v. State*, 56 Ark. 485, 20 S. W. 600; *State v. Southwestern R. Co.*, 66 Ga. 403; *Com'rs of Public Accounts v. Rose*, 1 Desaus. (S. C.) 461.

<sup>4</sup> *Duke v. State*, 56 Ark. 485, 20 S. W. 600.

<sup>5</sup> *State v. Echeveria*, 33 La. Ann. 709.

<sup>6</sup> *State v. Southwestern R. Co.*, 66 Ga. 403. See also *supra*, §§ 225, 226.

<sup>7</sup> *State v. Hackley*, 119 La. 482, 44 So. 272.

<sup>8</sup> *Sharp v. Kirkendall*, 2 J. J. Marsh. (Ky.) 150.

<sup>9</sup> See *supra*, §§ 706, 712.

tain supervisory powers;<sup>10</sup> and it has been recently said that his powers in criminal cases are only those conferred on him by statute.<sup>11</sup> In many jurisdictions, however, the authority of the attorney-general to prosecute criminals is recognized either by statute or as a common-law incident of his office;<sup>12</sup> and, where this is true, he may appear in such trials without stating any reason for so doing,<sup>13</sup> or he may authorize another attorney to assist therein.<sup>14</sup> In some instances the attorney-general is required to appear in criminal cases only when requested to do so by the governor;<sup>15</sup> thus, a New York statute requires him or his deputy to represent the people, when so directed by the governor, in the prosecution of crimes against the elective franchise, before all magistrates, in all courts, and before any grand jury.<sup>16</sup> And a Kansas statute requires him to enforce the provisions of a prohibitory liquor law in the event of the inability, neglect or refusal of the county attorney to do so.<sup>17</sup> In most states the attorney-general is authorized to represent the state in all criminal cases on appeal; but he may, and generally does, accept the services of the prosecuting attorney for this purpose.<sup>18</sup>

<sup>10</sup> *Sacramento County v. Central Pac. R. Co.*, 61 Cal. 250; *State v. District Ct.*, 22 Mont. 25, 55 Pac. 916.

<sup>11</sup> *Cosson v. Bradshaw*, (Ia.) 141 N. W. 1062.

<sup>12</sup> *People v. Gibson*, 53 Colo. 231, 125 Pac. 531; *People v. Kramer*, 33 Misc. 209, 15 N. Y. Crim. 257, 68 N. Y. S. 383; *State v. Heidt*, 20 N. D. 357, 127 N. W. 72; *State v. Becker*, 3 S. D. 29, 51 N. W. 1018.

<sup>13</sup> *State v. Hays*, 23 Mo. 287; *State v. White*, 21 N. D. 444, 131 N. W. 261.

<sup>14</sup> *State v. Russell*, 26 La. Ann. 68; *State v. Anderson*, 29 La. Ann. 774; *Com. v. Tuck*, 20 Pick. (Mass.) 356. See *supra*, §§ 695-704.

<sup>15</sup> *State v. Dawson*, 86 Kan. 180, 119 Pac. 360, 39 L.R.A.(N.S.) 993;

*Temple v. State*, (Tenn.) 155 S. W. 388; *Emery v. State*, 101 Wis. 627, 78 N. W. 145.

<sup>16</sup> *People v. Kramer*, 33 Misc. 209, 15 N. Y. Crim. 257, 68 N. Y. S. 383.

<sup>17</sup> *In re Gilson*, 34 Kan. 641, 9 Pac. 763; *State v. Crilly*, 69 Kan. 802, 77 Pac. 701; *State v. District Court*, 19 N. D. 819, Ann. Cas. 1912D 935, 124 N. W. 417.

<sup>18</sup> *Stewart v. State*, 24 Ind. 142; *State v. Jamison*, 142 Ind. 679, 42 N. E. 350; *State v. Sophor*, 157 Ind. 360, 61 N. E. 785; *State v. Fleming*, 13 Ia. 443; *People v. Burt*, 51 Mich. 199, 16 N. W. 378; *People v. Swift*, 59 Mich. 529, 26 N. W. 694; *People v. Bussey*, 80 Mich. 501, 45 N. W. 594; *State v. Cornwell*, 14 Wyo. 526, 85 Pac. 977.

§ 755. **Control of Trial.** — Where the attorney-general is empowered, either generally or specially, to conduct a criminal prosecution, he may do any act which the prosecuting attorney might do in the premises; that is, he can do each and every thing essential to prosecute in accordance with the law of the land,<sup>19</sup> and this includes appearing in proceedings before the grand jury.<sup>20</sup> So, an attorney-general, even at common law, had the right to enter a *nolle prosequi*,<sup>1</sup> although he could not do so during the trial without leave of court.<sup>2</sup>

<sup>19</sup> *People v. Gibson*, 53 Colo. 231, 125 Pac. 531; *State v. Bowles*, 70 Kan. 821, 79 Pac. 726, 69 L.R.A. 176; *State v. District Court*, 19 N. D. 819, Ann. Cas. 1912D 935, 124 N. W. 417.

<sup>20</sup> *People v. Kramer*, 33 Misc. 209, 15 N. Y. Crim. 257, 68 N. Y. S. 383; *State v. District Court*, 19 N. D. 819, Ann. Cas. 1912D 935, 124 N. W. 417. See also *State v. Robinson*, 101 Minn. 277, 289, 112 N. W. 269, 272, 20 L.R.A.(N.S.) 1127; *State v. District Court*, 22 Mont. 25, 55 Pac. 916.

<sup>1</sup> *Com. v. Tuck*, 20 Pick. (Mass.) 356; *People v. McLeod*, 1 Hill (N. Y.) 377, 37 Am. Dec. 328; *Rogers v. Hill*, 22 R. I. 496, 48 Atl. 670.

<sup>2</sup> *Com. v. Tuck*, 20 Pick. (Mass.) 356; *State v. I. S. S.*, 1 Tyler (Vt.) 178.

*In New York* the entry of a *nolle prosequi* is abolished by statute, and neither the attorney-general nor the district attorney can discontinue or abandon a prosecution for crime without an order of court. Code Crim. Pro. N. Y., §§ 671, 672.

## CHAPTER XXIX.

### SUSPENSION AND DISBARMENT GENERALLY.

#### *Power to Suspend or Disbar.*

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- 757. Power to Suspend or Disbar Generally.
- 758. Inherent Power.
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#### *Purpose and Effect of Suspension and Disbarment.*

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#### *Power to Suspend or Disbar.*

§ 756. **Revocability of License.** — An attorney at law is an officer of court, exercising a privilege or franchise to the enjoyment of which he has been admitted, not as a matter of right, but upon proof of fitness through evidence of his possession of satisfactory legal attainments and a fair character;<sup>1</sup> and it is essential that these qualifications should be maintained during his continu-

<sup>1</sup> In re Durant, 80 Conn. 140, 10 Ann. Cas. 539, 67 Atl. 497. And see *supra*, § 21 et seq.

ance in office.<sup>2</sup> The right to practice law is not an absolute one, nor has it ever been considered other than a license,<sup>3</sup> the holder of which is accountable to the court for the manner in which he exercises the privileges conferred upon him.<sup>4</sup> It is, of course, a valuable right,<sup>5</sup> not a mere indulgence revocable at the pleasure of the court or by an enactment of the legislature,<sup>6</sup> and can only be taken away by the judgment of a court of competent jurisdiction after a judicial hearing on charges legally presented, in which the attorney is given a full and fair opportunity to be heard.<sup>7</sup>

§ 757. **Power to Suspend or Disbar Generally.**—From what has been stated in the preceding section, it is evident that an attorney's license may be revoked either by his suspension or disbarment,<sup>8</sup> whenever it is satisfactorily established that he is an unfit or unsafe person to enjoy the privileges of an attorney at law, or to manage the business of others in that capacity.<sup>9</sup> Some questions have arisen, however, as to whether the power to disbar is inherent in the court, or whether it may be controlled entirely by legislation, and these will be considered later.<sup>10</sup> The fact that a member of the bar has relinquished his practice as such, and gone into another business, will not preclude the right of the court to disbar him;<sup>11</sup> nor will an attorney be permitted to defeat disbarment

<sup>2</sup> In re Thatcher, 190 Fed. 969.

<sup>3</sup> *Wormimont v. State*, 101 Ark. 210, Ann. Cas. 1913D 1156, 142 S. W. 194; In re Baun, 55 Hun 611 mem., 8 N. Y. S. 771. And see *supra*, § 21.

<sup>4</sup> Ex p. Brounsall, 2 Cowp. (Eng.) 829; Ex p. Garland, 4 Wall. 333, 18 U. S. (L. ed.) 366; Ex p. Robinson, 19 Wall. 505, 22 U. S. (L. ed.) 205; Ex p. Wall, 107 U. S. 265, 2 S. Ct. 569, 27 U. S. (L. ed.) 552; In re Durant, 80 Conn. 140, 10 Ann. Cas. 539, 67 Atl. 497.

<sup>5</sup> In re Thatcher, 190 Fed. 969.

<sup>6</sup> Ex p. Garland, 4 Wall. 333, 18 U. S. (L. ed.) 366.

<sup>7</sup> Ex p. Garland, 4 Wall. 333 18 U. S. (L. ed.) 366; In re Thatcher, 190 Fed. 969; *Shackelford v. Me-*

*Elhinney*, 241 Mo. 592, 145 S. W. 1139. And see *infra*, § 865 et seq., as to procedure generally.

<sup>8</sup> *Connecticut*.—In re Durant, 80 Conn. 140, 10 Ann. Cas. 539, 67 Atl. 497.

*New York*.—In re Flannery, 150 App. Div. 369, 135 N. Y. S. 612.

*North Carolina*.—Ex p. Biggs, 64 N. C. 202.

*South Carolina*.—*State v. Holding*, 1 McCord L. 379.

*Utah*.—In re Evans, 130 Pac. 217.

<sup>9</sup> As to grounds for disbarment, see *infra*, §§ 773-852.

<sup>10</sup> See the two following sections.

<sup>11</sup> In re Dellenbaugh, 9 Ohio Cir. Dec. 325, 17 Ohio Cir. Ct. 103.

proceedings by his voluntary resignation prior to the entry of judgment.<sup>12</sup> So, it has been held that the judge of a court of record may be disbarred as an attorney.<sup>13</sup> Nor will the power to disbar an attorney be affected either by the wealth or poverty of the attorney or his client, or the importance or unimportance of the interests at stake in a particular case. To quote a distinguished jurist: "The respondent in this case was in the employ of clients who were supposed to have great wealth and who were at the head of important corporations. The impression that they are immune from civil or criminal prosecution for their acts seems to have pervaded the community of late years, and with it has grown up a sentiment among many members of the profession that, in carrying out their behest, a lawyer is performing his duty to the profession, to the public, and to the courts. It is the importance, or assumed importance, of the client, which is sought to justify acts which would be at once condemned in connection with a client who did not have great wealth or great prominence. If the profession is to have the respect of the community, if it is to be trusted by courts and by others who have to do with the administration of justice, its members must realize that a crime is a crime, whosoever commits it; and while the highest as well as the lowest criminal is entitled to the protection that the law gives, is entitled to have counsel of his selection, and is entitled to all the safeguards that have been devised for his protection, neither his wealth nor prominence will protect a lawyer in going outside of his professional obligations to shield him from the consequences of his acts."<sup>14</sup>

The power to disbar or suspend an attorney is distinct, of course, from the power to punish him for contempt.<sup>15</sup>

**§ 758. Inherent Power.** — From the very earliest times the right to punish attorneys by suspension or disbarment, as well as for contempt, has been exercised by the courts as an inherent

<sup>12</sup> *Scott v. Van Alstyne*, 9 Johns. (N. Y.) 216; *Ex p. Thompson*, 32 Ore. 499, 52 Pac. 570, 40 L.R.A. 194.

<sup>13</sup> *In re Dellenbaugh*, 9 Ohio Cir. Dec. 325, 17 Ohio Cir. Ct. 106, *affirmed* 62 Ohio St. 658, 58 N. E. 1098.

<sup>14</sup> *Per Ingraham, J. In re Robinson*, 140 App. Div. 329, 125 N. Y. S. 193.

<sup>15</sup> *In re Boone*, 83 Fed. 944; *In re Adriaans*, 17 App. Cas. (D. C.) 39. And see *infra*, § 791, as to contempts generally.

power; <sup>16</sup> indeed, it has been truthfully said that nothing is better

<sup>16</sup> *England*.—Ex p. Brounsall, 2 Cowp. 829; In re Martin, 6 Beav. 337; In re Hardwick, 12 Q. B. D. 148, 53 L. J. Q. B. 64, 49 L. T. N. S. 584, 32 W. R. 191; Rex v. Bach, 9 Price 349.

*Canada*.—In re Currie, 25 Grant. Ch. (U. C.) 338; Re Titus, 5 Ont. 92.

*United States*.—Bradley v. Fisher, 13 Wall. 354, 20 U. S. (L. ed.) 652; Ex p. Robinson, 19 Wall. 512, 22 U. S. (L. ed.) 208; Ex p. Secombe, 19 How. 13, 15 U. S. (L. ed.) 566; Ex p. Burr, 2 Cranch (C. C.) 389, 4 Fed. Cas. No. 2,186; Ex p. Cole, 1 McCrary 405, 6 Fed. Cas. No. 2,973. In re Boone, 83 Fed. 948.

*Arkansas*.—Beene v. State, 22 Ark. 149; Wernimont v. State, 101 Ark. 210, Ann. Cas. 1913D 1156, 142 S. W. 194.

*California*.—Cohen v. Wright, 22 Cal. 293; Pedersen v. Superior Court, 149 Cal. 389, 86 Pac. 712.

*Colorado*.—People v. Green, 9 Colo. 506, 13 Pac. 514; In re Walkey, 26 Colo. 161, 56 Pac. 576.

*Connecticut*.—In re Durant, 80 Conn. 140, 10 Ann. Cas. 539, 67 Atl. 497.

*District of Columbia*.—Matter of Adriaans, 17 App. Cas. 46.

*Florida*.—State v. Kirke, 12 Fla. 284, 95 Am. Dec. 314.

*Hawaii*.—See Matter of Cooper, 12 Hawaii 124.

*Illinois*.—People v. Goodrich, 79 Ill. 148; Moutray v. People, 162 Ill. 194, 44 N. E. 496; People v. George, 186 Ill. 126, 57 N. E. 804; People v. Chamberlain, 212 Ill. 260, 89 N. E. 994.

*Kansas*.—Farlin v. Sook, 30 Kan. 101, 1 Pac. 123, 46 Am. Rep. 100;

In re Wilson, 79 Kan. 450, 100 Pac. 75.

*Kentucky*.—Rice v. Com., 18 B. Mon. 472; Baker v. Com., 10 Bush 599; Nelson v. Com., 128 Ky. 779, 109 S. W. 337; Com. v. Roe, 129 Ky. 650, 112 S. W. 683; Underwood v. Com., 105 S. W. 156, 32 Ky. L. Rep. 32.

*Louisiana*.—State v. Rightor, 49 La. Ann. 1015, 22 So. 195.

*Maine*.—Sanborn v. Kimball, 64 Me. 140.

*Massachusetts*.—Manning v. French, 149 Mass. 391, 21 N. E. 945, 4 L.R.A. 339; Burrage v. Bristol County, 210 Mass. 299, 96 N. E. 719. See also Boston Bar Ass'n v. Greenhood, 168 Mass. 169, 46 N. E. 568.

*Michigan*.—In re Mains, 121 Mich. 608, 80 N. W. 714; In re Radford, 168 Mich. 474, 134 N. W. 472.

*Missouri*.—State v. Laughlin, 73 Mo. 443; State v. Harber, 129 Mo. 294, 31 S. W. 889; State v. Mullins, 129 Mo. 236, 31 S. W. 744; In re Bowman, 7 Mo. App. 569; State v. Clopton, 15 Mo. App. 589; State v. Gelhardt, 87 Mo. App. 549; Neff v. Kohler Mfg. Co., 90 Mo. App. 296.

*Nebraska*.—State v. Burr, 19 Neb. 593, 28 N. W. 261; In re Newby, 76 Neb. 482, 107 N. W. 850.

*Nevada*.—In re Breen, 30 Nev. 164, 93 Pac. 997, 17 L.R.A. (N.S.) 572.

*New Hampshire*.—Delano's Case, 58 N. H. 5, 42 Am. Rep. 555.

*New York*.—Matter of Cooper, 22 N. Y. 67; In re Percy, 36 N. Y. 651; Matter of Silkman, 88 App. Div. 104, 84 N. Y. S. 1025.

*North Carolina*.—Ex p. Biggs, 64 N. C. 202; Matter of Moore, 64 N. C.



settled than the fact of the existence of this power,<sup>17</sup> and that the court may exercise it with as much propriety as if it were embedded in the constitution or declared by statute,<sup>18</sup> in the absence of restrictive legislation.<sup>19</sup> This summary power of courts of competent jurisdiction,<sup>20</sup> therefore, exists independently of statute, and may be exercised as necessity requires.<sup>1</sup>

398; *Matter of Ebbs*, 150 N. C. 44, 17 Ann. Cas. 592, 63 S. E. 190, 19 L.R.A.(N.S.) 892.

*North Dakota*.—In *re* Simpson, 9 N. D. 404, 83 N. W. 541.

*Ohio*.—In *re* Swadener, 5 Ohio Dec. 598; In *re* Thatcher, 80 Ohio St. 492, 89 N. E. 39.

*Oklahoma*.—In *re* Mosher, 24 Okla. 61, 20 Ann. Cas. 209, 102 Pac. 705, 24 L.R.A.(N.S.) 530; *State Bar Commission v. Sullivan*, 35 Okla. 745, 131 Pac. 703.

*Oregon*.—*State v. Winton*, 11 Ore. 456, 5 Pac. 337, 50 Am. Rep. 486, Ex p. Finn, 32 Ore. 519, 52 Pac. 756, 67 Am. St. Rep. 550.

*Pennsylvania*.—*Austin's Case*, 5 Rawle 204, 28 Am. Dec. 657; In *re* Davies, 93 Pa. St. 116, 39 Am. Rep. 729; *Serfass's Case*, 116 Pa. St. 455, 9 Atl. 674; In *re* Smith, 179 Pa. St. 22, 36 Atl. 134; In *re* Hirst, 9 Phila. 216, 31 Leg. Int. 340.

*South Carolina*.—*State v. Holding*, 1 McCord L. 379; In *re* Duncan, 64 S. C. 476, 42 S. E. 433.

*South Dakota*.—In *re* Egan, 22 S. D. 355, 117 N. W. 874; *Danforth v. Egan*, 23 S. D. 43, 20 Ann. Cas. 418, 119 N. W. 1021, 139 Am. St. Rep. 1030.

*Tennessee*.—*Fields v. State*, 1 Mart. & Y. 171; *Brooks v. Fleming*, 6 Baxt. 337; *Smith v. State*, 1 Yerg. 228.

*Texas*.—*Jackson v. State*, 21 Tex. 668.

*Utah*.—*Morrison v. Snow*, 26 Utah 247, 72 Pac. 924; In *re* Evans, 130 Pac. 217.

*Vermont*.—In *re* Jones, 70 Vt. 86, 39 Atl. 1087.

*Washington*.—*Matter of Lambuth*, 18 Wash. 478, 51 Pac. 1071; *State v. Grover*, 47 Wash. 39, 91 Pac. 564; In *re* Robinson, 48 Wash. 153, 15 Ann. Cas. 415, 92 Pac. 929, 15 L.R.A.(N.S.) 525; *State v. Rossman*, 53 Wash. 1, 17 Ann. Cas. 625, 101 Pac. 357, 21 L.R.A.(N.S.) 821.

*West Virginia*.—*State v. McClagherty*, 33 W. Va. 250, 10 S. E. 407; *State v. Stiles*, 48 W. Va. 425, 37 S. E. 620; *State v. Hays*, 64 W. Va. 45, 61 S. E. 356.

*Wisconsin*.—*Vernon County Bar Ass'n v. McKibbin*, 153 Wis. 350, 141 N. W. 283.

<sup>17</sup> *State v. Laughlin*, 10 Mo. App. 1.

<sup>18</sup> *Danforth v. Egan*, 23 S. D. 43, 20 Ann. Cas. 418, 119 N. W. 1021, 139 Am. St. Rep. 1030.

<sup>19</sup> In *re* Ebbs, 150 N. C. 44, 17 Ann. Cas. 592, 63 S. E. 190, 19 L.R.A.(N.S.) 892. And see the following section.

<sup>20</sup> See *infra*, § 764 et seq.

<sup>1</sup> *Com. v. Roe*, 129 Ky. 650, 112 S. W. 683, 19 L.R.A.(N.S.) 413; *State v. Harber*, 129 Mo. 271, 31 S. W. 889; *State v. Gebhardt*, 87 Mo. App. 542; In *re* Breen, 30 Nev. 164, 93 Pac. 997, 17 L.R.A.(N.S.) 572; In *re* Evans, (Utah) 130 Pac. 217.

§ 759. **As Affected by Statute.**—The question whether the power to admit and disbar attorneys is a judicial or a legislative function has been given some prominence in the books; this subject has been considered heretofore in connection with the power to admit attorneys to practice, and the principles there stated are equally applicable here.<sup>2</sup> It is not doubted, of course, that the legislature may regulate as to the disbarment of attorneys, and that such regulation will be binding on the courts.<sup>3</sup> So, the legislature may, and frequently does, specify causes for disbarment; but a statutory enumeration of grounds of disbarment is not to be taken as a limitation on the general power of the court in this respect; and, notwithstanding such legislation, attorneys may be removed for common-law causes whenever the exercise of their privileges and functions becomes inimical to the due administration of justice.<sup>4</sup> The legislature cannot limit the courts in their right to determine the moral qualifications of attorneys or prevent them from refusing to admit morally unfit persons to the practice of the law;<sup>5</sup> and even conceding that the legislature has the power

<sup>2</sup> See *supra*, §§ 28, 29.

<sup>3</sup> *People v. Kavanagh*, 220 Ill. 49, 77 N. E. 107, 110 Am. St. Rep. 223; *Ex p. Smith*, 28 Ind. 47; *State v. Byrnett*, 4 Ohio Dec. 89; *State v. McClaugherty*, 33 W. Va. 250, 10 S. E. 407.

<sup>4</sup> *United States*.—In *re Boone*, 83 Fed. 944.

*Iowa*.—*State v. Mosher*, 128 Ia. 82, 5 Ann. Cas. 984, 103 N. W. 105.

*Kansas*.—In *re Smith*, 73 Kan. 743, 85 Pac. 584.

*Kentucky*.—*Nelson v. Com.*, 128 Ky. 779, 109 S. W. 337, 16 L.R.A.(N.S.) 272, 33 Ky. L. Rep. 143; *Com. v. Roe*, 129 Ky. 650, 112 S. W. 683, 19 L.R.A.(N.S.) 413.

*Massachusetts*.—*Bar Assoc. of Boston v. Greenwood*, 168 Mass. 169, 46 N. E. 568.

*Michigan*.—In *re Mills*, 1 Mich. 392.

*Missouri*.—*State v. Laughlin*, 10 Mo. App. 1; *State v. Gebhardt*, 87 Mo. App. 542.

*Nevada*.—In *re Breen*, 30 Nev. 164, 93 Pac. 997, 17 L.R.A.(N.S.) 572.

*New York*.—In *re Percy*, 36 N. Y. 651.

*North Carolina*.—In *re Ebbs*, 150 N. C. 44, 17 Ann. Cas. 592, 63 S. E. 190, 19 L.R.A.(N.S.) 892. *Compare Ex p. Schenck*, 65 N. C. 353; *Kane v. Haywood*, 66 N. C. 1.

*Ohio*.—In *re Thatcher*, 80 Ohio St. 492, 89 N. E. 39.

*Oklahoma*.—*State Bar Commission v. Sullivan*, 35 Okla. 745, 131 Pac. 703.

*South Dakota*.—In *re Egan*, 22 S. D. 355, 117 N. W. 874.

*West Virginia*.—*State v. McClaugherty*, 33 W. Va. 250, 10 S. E. 407.

<sup>5</sup> In *re Platz*, (Utah) 132 Pac. 390.

to specify exclusive grounds for the disbarment of attorneys, and thereby to limit the inherent power which the court has exercised from time immemorial, it will not be deemed to have done so unless its purpose is clearly expressed.<sup>6</sup> Nor does a constitutional provision to the effect that certain persons shall be eligible to practice as attorneys in a newly formed state, prevent the state court from disbarring such persons for good cause.<sup>7</sup> Under some statutes, however, it has been held that the courts are bound by the causes for disbarment specified by the legislature.<sup>8</sup>

**§ 760. Basis of Power.** — The basis of the power to suspend or disbar attorneys at law is to be found in the fact that they are officers of the court, bound to uphold and maintain the dignity of the law, and to refrain from such conduct as may have a tendency to bring it into disrepute.<sup>9</sup> Integrity, as well as learning, is essential to members of the legal profession, and it becomes the duty of the bench, as well as of the bar, to preserve those qualities.<sup>10</sup> Indeed, the discipline of attorneys is not only a matter of vital public interest,<sup>11</sup> but it is equally essential to the due and orderly administration of justice,<sup>12</sup> and the protection of the court.<sup>13</sup> And in exercising the power of disbarment or suspension, the inquiry is always in the nature of an investigation by the court into the conduct of one of its own officers, and the exercise of disciplinary jurisdiction.<sup>14</sup> "It is our duty," said the court in a recent case,

<sup>6</sup> *In re Smith*, 73 Kan. 743, 85 Pac. 584.

<sup>7</sup> *In re Mosher*, 24 Okla. 61, 20 Ann. Cas. 209, 102 Pac. 705.

<sup>8</sup> *In re Collins*, 147 Cal. 8, 81 Pac. 220; *In re Treadwell*, (Cal.) 4 Pac. 1192; *In re Eaton*, 4 N. D. 514, 62 N. W. 597.

<sup>9</sup> *Wernimont v. State*, 101 Ark. 210, Ann. Cas. 1913D 1156, 142 S. W. 194; *Haverty v. Haverty*, 35 Kan. 438, 11 Pac. 364; *Morrison v. Snow*, 26 Utah 247, 72 Pac. 924; *McWhirter v. Donaldson*, 36 Utah 293, 104 Pac. 731.

<sup>10</sup> *In re Boone*, 83 Fed. 944; *Wernimont v. State*, 101 Ark. 210, Ann.

Cas. 1913D 1156, 142 S. W. 194; *Matter of Disbarment of Lyons*, 162 Mo. App. 688, 145 S. W. 844; *Dickens' Case*, 67 Pa. St. 169, 5 Am. Rep. 420.

<sup>11</sup> *Burrage v. Bristol County*, 210 Mass. 299, 96 N. E. 719.

<sup>12</sup> *In re Boone*, 83 Fed. 944.

<sup>13</sup> *In re Bowman*, 7 Mo. App. 569.

<sup>14</sup> *In re Durant*, 80 Conn. 140, 10 Ann. Cas. 539, 67 Atl. 497. See also *In re Hardwick*, L. R. 12 Q. B. (Eng.) 148; *Ex p. Garland*, 4 Wall. 333, 18 U. S. (L. ed.) 366; *Fairfield County Bar v. Taylor*, 60 Conn. 11, 22 Atl. 441, 13 L.R.A. 767.

“to condemn conduct which tends to impair or defeat the administration of justice or degrade and impair the usefulness of the profession, and protect the state and the public from lawyers who prostitute the authority given to them for private gain by imposing on or defrauding their clients or the tribunals which are instituted to administer the law, and protect those whose rights and interests are committed to their care. If this country is to be governed by law, it is essential that those charged with its administration should be honest in the discharge of the duties confided to and obligations imposed upon them.”<sup>15</sup>

§ 761. **Nature of Power.**—The power of the court to disbar or suspend an attorney, however, is not an arbitrary or despotic one, to be exercised at its pleasure, or because of prejudice or personal hostility;<sup>16</sup> but, on the other hand, it must be exercised with sound judicial discretion,<sup>17</sup> due caution,<sup>18</sup> and moderation;<sup>19</sup> guarding the rights and independence of the bar as well as the dignity and authority of the court.<sup>20</sup> It is a power which should only be exercised for the most weighty reasons, such as would render the continuance of the attorney in practice incompatible with a proper respect of the court for itself, or a proper regard for the integrity of the profession;<sup>1</sup> the question for determination be-

<sup>15</sup> *In re Flannery*, 150 App. Div. 369, 135 N. Y. S. 612.

<sup>16</sup> *Ex p. Secombe*, 19 How. 9, 15 U. S. (L. ed.) 565; *In re Egan*, 24 S. D. 301, 123 N. W. 478; *State v. Stiles*, 48 W. Va. 425, 37 S. E. 620.

<sup>17</sup> *United States*.—*Ex p. Secombe*, 19 How. 9, 15 U. S. (L. ed.) 565; *Ex p. Garland*, 4 Wall. 333, 18 U. S. (L. ed.) 366; *Ex p. Bradley*, 7 Wall. 364, 19 U. S. (L. ed.) 214; *Ex p. Burr*, 9 Wheat. 529, 6 U. S. (L. ed.) 152; *Ex p. Wall*, 107 U. S. 265, 2 S. Ct. 569, 27 U. S. (L. ed.) 552; *In re Boone*, 83 Fed. 944; *In re Thatcher*, 190 Fed. 969.

*Connecticut*.—*Fairfield County Bar v. Taylor*, 60 Conn. 11, 22 Atl. 441,

13 L.R.A. 767; *In re Durant*, 80 Conn. 140, 10 Ann. Cas. 539, 67 Atl. 497.

*Maryland*.—*Miles v. Stevenson*, 80 Md. 358, 30 Atl. 646.

*Pennsylvania*.—*In re Davies*, 93 Pa. St. 116, 39 Am. Rep. 729.

<sup>18</sup> *Bradley v. Tochman*, 1 Hayw. & H. 263, 3 Fed. Cas. No. 1,788; *Wernimont v. State*, 101 Ark. 210, Ann. Cas. 1913D 156, 142 S. W. 194.

<sup>19</sup> *In re Durant*, 80 Conn. 140, 10 Ann. Cas. 539, 67 Atl. 497; *Com. v. Roe*, 129 Ky. 650, 112 S. W. 683, 19 L.R.A. (N.S.) 413.

<sup>20</sup> *State v. Laughlin*, 10 Mo. App. 1.

<sup>1</sup> *Bradley v. Fisher*, 13 Wall. 354, 20 U. S. (L. ed.) 646; *Ex p. Burr*, 9 Wheat. 529, 6 U. S. (L. ed.) 152; *In*

ing whether or not the attorney is a fit person to be longer allowed the privileges of the bar.<sup>2</sup>

*Purpose and Effect of Suspension and Disbarment.*

§ 762. **Purpose.**— The purpose of suspending or disbaring an attorney is not to punish him, but to preserve courts of justice from the official ministration of persons unfit to practice in them, and thereby to guard the administration of justice and protect the public;<sup>3</sup> that it also punishes the attorney is wholly incidental.<sup>4</sup> Indeed, it is only necessary to call attention to the fact that one already punished for the commission of a crime may be disbarred because thereof,<sup>5</sup> to show that disbarment proceedings are not invoked for the purpose of inflicting punishment.<sup>6</sup> The admission of one to practice law is a certificate from the court that such person possesses mental and moral qualifications for an office which has an intimate and vital relation to the administration of justice;<sup>7</sup> and whenever the courts shall become persuaded that an attorney has lost these qualifications, essential to his usefulness and necessary to the safety of his employers, they are wanting in their duties if they do not take away his means and destroy his opportunities for

re Boone, 83 Fed. 944; In re Thatcher, 190 Fed. 969.

<sup>2</sup> *Fairfield County Bar v. Taylor*, 60 Conn. 11, 22 Atl. 441, 13 L.R.A. 767; In re Durant, 80 Conn. 140, 10 Ann. Cas. 539, 67 Atl. 497.

<sup>3</sup> *England*.—Ex p. Bromsall, 2 Cowp. 829.

*United States*.—Ex p. Bradley, 7 Wall. 364, 19 U. S. (L. ed.) 214; Ex p. Wall, 107 U. S. 265, 2 S. Ct. 569, 27 U. S. (L. ed.) 552; In re Thatcher, 190 Fed. 969.

*Connecticut*.—*Fairfield County Bar v. Taylor*, 60 Conn. 11, 22 Atl. 441, 13 L.R.A. 767; In re Durant, 80 Conn. 140, 10 Ann. Cas. 539, 67 Atl. 497.

*Massachusetts*.—*Boston Bar Association v. Greenhood*, 168 Mass. 169, 46 N. E. 568.

*Michigan*.—In re Shepard, 109 Mich. 631, 67 N. W. 971; In re Radford, 168 Mich. 474, 134 N. W. 472.

*New York*.—*Matter of Boland*, 127 App. Div. 746, 752, 111 N. Y. S. 932.

*Ohio*.—In re Palmer, 8 Ohio Cir. Dec. 508, 15 Ohio Cir. Ct. 94.

*South Dakota*.—In re Egan, 24 S. D. 301, 123 N. W. 478.

<sup>4</sup> In re Thatcher, 190 Fed. 969.

<sup>5</sup> See *infra*, §§ 853-864.

<sup>6</sup> In re Thatcher, 190 Fed. 969.

<sup>7</sup> In re Thatcher, 190 Fed. 969. And see also *supra*, §§ 34, 41-50.

mischievous action.<sup>8</sup> The desired end cannot be effectually obtained in any other way.<sup>9</sup>

§ 763. **Effect.**—Formerly each court might, for itself, suspend or disbar the attorneys who practiced therein, but such judgment was not effective in other courts.<sup>10</sup> Thus, in jurisdictions having a separate chancery court it was held that a proceeding for disbarment therein did not affect the respondent's connection with the law court.<sup>11</sup> This condition of affairs was remedied in England many years ago.<sup>12</sup> In this country most jurisdictions, either under statute or by judicial decree, recognize the unfitness of one who has been disbarred in another court, and even in another jurisdiction;<sup>13</sup> and it is generally held that the disbarment or suspension of an attorney by one court of a state is operative in all other courts of that state.<sup>14</sup>

The disbarment of an attorney is an adjudication that he does not possess the requisite qualifications in order to be entitled to practice law;<sup>15</sup> in other words, he is not "learned

<sup>8</sup> *United States*.—In *re* Thatcher, 190 Fed. 969.

*District of Columbia*.—In *re* Adriaans, 17 App. Cas. 39.

*Missouri*.—Matter of Lyons, 162 Mo. App. 688, 145 S. W. 844.

*Ohio*.—State *v.* Hand, 9 Ohio 42.

*Oregon*.—State *v.* Finn, 32 Ore. 519, 52 Pac. 756, 67 Am. St. Rep. 550.

<sup>9</sup> State *v.* Laughlin, 10 Mo. App. 1.

<sup>10</sup> Ex p. Tillinghast, 4 Pet. 108, 7 U. S. (L. ed.) 798; Ex p. Bradley, 7 Wall. 364, 19 U. S. (L. ed.) 214; Bradley *v.* Fisher, 13 Wall. 335, 20 U. S. (L. ed.) 646; In *re* Thatcher, 190 Fed. 969; State *v.* Kirke, 12 Fla. 278, 95 Am. Dec. 315; Montray *v.* People, 162 Ill. 194, 44 N. E. 496.

<sup>11</sup> In *re* Hoffecker, (Del.) 60 Atl. 981. But see In *re* Peterson, 3 Paige (N. Y.) 510.

<sup>12</sup> See Stats. 22, 24 Vict. (1860), c. 127, § 25. See also Ex p. Hague, 3 Brod. & B. (Eng.) 257; Ex p. Yates,

9 Bing. 455, 23 E. C. L. 331; In *re* Whytehead, 4 M. & G. 768, 43 E. C. L. 396; Matter of Collins, 18 C. B. 272, 86 E. C. L. 272.

<sup>13</sup> State *v.* Mosher, 128 Ia. 82, 5 Ann. Cas. 984, 103 N. W. 105; In *re* Evans, 22 Utah 388, 62 Pac. 913, 83 Am. St. Rep. 794, 53 L.R.A. 952.

<sup>14</sup> Wilson *v.* Popham, 91 Ky. 327, 15 S. W. 859, 12 Ky. L. Rep. 904; Cobb *v.* Judge of Superior Court, 43 Mich. 289, 5 N. W. 309; In *re* Peterson, 3 Paige (N. Y.) 510; Danforth *v.* Egan, 23 S. D. 43, 20 Ann. Cas. 418, 119 N. W. 1021, 139 Am. St. Rep. 1030.

A statute in New York provides that the suspension or removal of an attorney or counselor, by the supreme court, operates as a suspension or removal in every court of the state. Judiciary Law, § 478.

<sup>15</sup> See also In *re* Schull, 25 S. D. 602, 127 N. W. 541.

in the law."<sup>16</sup> and, consequently, he cannot thereafter practice as an attorney.<sup>17</sup> Nor will a disbarred attorney be eligible to any office where these qualifications are required. Thus, he may not occupy the position of prosecuting attorney,<sup>18</sup> or attorney-general.<sup>19</sup> Of course, where an order of suspension only is entered, the court may therein provide that the respondent be permitted to perform his official duties as district attorney.<sup>20</sup> A disbarred or suspended attorney has no authority to act in his professional capacity, even to move to open a default judgment taken against a client;<sup>1</sup> his brief in a pending appeal will not be considered by the appellate court,<sup>2</sup> and if he attempts to practice or holds himself out as an attorney, he is guilty of contempt.<sup>3</sup>

### *Jurisdiction.*

§ 764. **In General.**—In nearly all jurisdictions legislation has designated the court wherein disbarment proceedings may be prosecuted, and, of course, such a regulation is binding.<sup>4</sup> In some

<sup>16</sup> *Danforth v. Egan*, 23 S. D. 43, 20 Ann. Cas. 418, 119 N. W. 1021, 139 Am. St. Rep. 1030.

<sup>17</sup> *In re Duncan*, 83 S. C. 186, 18 Ann. Cas. 657, 65 S. E. 210, 24 L.R.A. (N.S.) 750.

<sup>18</sup> *People v. Hallett*, 1 Colo. 352; *Brown v. Woods*, 2 Okla. 601, 39 Pac. 473; *Danforth v. Egan*, 23 S. D. 43, 20 Ann. Cas. 418, 119 N. W. 1021, 139 Am. St. Rep. 1030. And see also *supra*, § 692.

*Compare State v. Swan*, 60 Kan. 461, 56 Pac. 750, wherein it was held that the local law would not require the prosecuting officer to be an attorney. This, however, is no longer true in Kansas. See *supra*, § 692.

<sup>19</sup> See *supra*, §§ 724, 731.

<sup>20</sup> *In re Maestretti*, 30 Nev. 187, 93 Pac. 1004.

<sup>1</sup> *McDonald v. Kane*, 54 Misc. 672, 120 N. Y. S. 283.

<sup>2</sup> *Engesser v. Northern Pac. R. Co.*, 18 Mont. 31, 44 Pac. 279; *Stebbins v. Morris*, 18 Mont. 32, 44 Pac. 280.

<sup>3</sup> *State v. Richardson*, 125 La. 644, 51 So. 673; *In re Duncan*, 83 S. C. 186, 18 Ann. Cas. 657, 65 S. E. 210, 24 L.R.A. (N.S.) 750.

That a suspended attorney acted upon the advice of reputable counsel to the effect that certain acts which he did after suspension would not violate the order of suspension, will not prevent him from being guilty of technical contempt of court, if such acts did violate the order. *State v. Richardson*, 125 La. 644, 51 So. 673.

<sup>4</sup> *United States*.—See *Ex p. Burr*, 2 Cranch (C. C.) 379, 4 Fed. Cas. No. 2,186.

*Connecticut*.—*Fairfield County Bar v. Taylor*, 60 Conn. 11, 22 Atl. 441, 13 L.R.A. 767.

*Illinois*.—*Winkelman v. People*, 50 Ill. 449.

instances it is provided that such proceedings may be had in any court of record,<sup>5</sup> or in courts of general or superior jurisdiction,<sup>6</sup> or in the court of the attorney's domicile;<sup>7</sup> and in some states concurrent jurisdiction has been conferred on two or more courts.<sup>8</sup> As a rule, however, disbarment proceedings should be instituted in a court of civil jurisdiction, and in some instances this is required.<sup>9</sup> The local statutes should be consulted. While the action of the court in admitting a person to practice law or in striking his name from the roll for any reason is of a judicial nature, the constitutional authority of the court is not limited as in proceedings between parties, and the mere lapse of a term will not disable the court from striking from the roll the name of an attorney erroneously given a license to practice.<sup>10</sup>

### § 765. Courts Having Power to Admit Attorneys.—

In the absence of legislation providing otherwise, attorneys may be disbarred by courts of record which have authority to admit them to practice therein;<sup>11</sup> but there is no necessary connection between

*Iowa*.—*State v. Mosher*, 128 Ia. 82, 5 Ann. Cas. 984, 103 N. W. 105.

*Louisiana*.—*State v. Rightor*, 49 La. Ann. 1015, 22 So. 195; *State v. Fouchy*, 106 La. 743, 31 So. 325.

*Missouri*.—*State v. Laughlin*, 73 Mo. 443; *State v. Peabody*, 63 Mo. App. 378.

*Nebraska*.—*In re Newby*, 76 Neb. 482, 107 N. W. 853.

*Nevada*.—*In re Breen*, 30 Nev. 164, 93 Pac. 997, 17 L.R.A. (N.S.) 572.

*New York*.—Laws of 1912, c. 253 (Chase's Code of Civil Procedure, § 67); *In re Flannery*, 150 App. Div. 369, 135 N. Y. S. 612.

*North Dakota*.—*In re Freerks*, 11 N. D. 120, 90 N. W. 265.

*Ohio*.—*In re Thatcher*, 80 Ohio St. 492, 89 N. E. 83; *In re Dellenbaugh*, 9 Ohio Cir. Dec. 325, 17 Ohio Cir. Ct. 106.

*South Dakota*.—*In re Duncan*, 64 S. C. 461, 42 S. E. 433.

<sup>5</sup> *Mattler v. Schaffner*, 53 Ind. 245; *State v. Mosher*, 128 Ia. 82, 5 Ann. Cas. 984, 103 N. W. 105.

<sup>6</sup> *State v. Fort*, 178 Mo. 518, 77 S. W. 741; *In re Evans*, (Utah) 130 Pac. 217.

<sup>7</sup> *Chevalon v. Schmidt*, 11 Rob. (La.) 91; *Turner v. Walsh*, 12 Rob. (La.) 383.

<sup>8</sup> *In re Delmas*, 139 Cal. xix, mem., 72 Pac. 402.

<sup>9</sup> *Mattler v. Schaffner*, 53 Ind. 245; *Com. v. Richie*, 114 Ky. 366, 70 S. W. 1054, 24 Ky. L. Rep. 1218. *Compare* *Ex p. Steinman*, 8 W. N. C. (Pa.) 296.

<sup>10</sup> *Vernon County Bar Assoc. v. McKibbin*, 153 Wis. 350, 141 N. W. 283.

<sup>11</sup> *United States*.—*Ex p. Wall*, 107 U. S. 265, 2 S. Ct. 569, 27 U. S. (L. ed.) 552, 27 Alb. L. J. 406, 5 Ky. L. Rep. 2.



the power to admit to practice and the power to disbar for subsequent misconduct; and the legislature may confer on any court of the state the power to suspend or disbar attorneys,<sup>12</sup> and it is usual to confer this power on a particular court.<sup>13</sup> And it has been held that a statute which confined, to a particular court, the power of admitting attorneys to the bar, did not take away the jurisdiction, theretofore possessed by other courts under statute, to suspend or remove attorneys from office.<sup>14</sup>

§ 766. **Court before Which Attorney Practices.**—Some statutes authorize the institution of disbarment proceedings in any court in which the attorney practices,<sup>15</sup> and, in such case, the court designated will have jurisdiction, even though the respondent does not reside within the county or judicial district wherein the court is located;<sup>16</sup> and it is immaterial that the respondent's right to practice in such court was not derived from it.<sup>17</sup> So, in the absence of legislation to the contrary, the court whose conduct is questioned or attacked by an attorney practicing before it, is the proper authority to dispose of disbarment proceedings, based on such conduct, against the attorney.<sup>18</sup> Thus, it has been held that a court of quarter sessions has jurisdiction to disbar an attorney for such misbehavior.<sup>19</sup>

§ 767. **Appellate Courts.**—It has been held that an appellate court has original jurisdiction to disbar an attorney either for

*California.*—*People v. Turner*, 1 Cal. 190.

*Connecticut.*—*In re Westcott*, 66 Conn. 585, 34 Atl. 505.

*Missouri.*—*State v. Fort*, 178 Mo. 518, 77 S. W. 741.

*New Hampshire.*—*In re Bryant*, 24 N. H. 149.

*New York.*—*In re Burchard*, 27 Hun 429.

*Ohio.*—*In re Thatcher*, 80 Ohio St. 492, 89 N. E. 39.

<sup>12</sup> *State v. Mosher*, 128 Ia. 82, 5 Ann. Cas. 984, 103 N. W. 105.

<sup>13</sup> See the preceding section.

<sup>14</sup> *In re Dellenbaugh*, 9 Ohio Cir. Dec. 325, 17 Ohio Cir. Ct. 106.

<sup>15</sup> *In re Darrow*, 175 Ind. 44, 92 N. E. 369.

<sup>16</sup> *In re Darrow*, 175 Ind. 44, 92 N. E. 369.

<sup>17</sup> *State v. Kirke*, 12 Fla. 278, 95 Am. Dec. 314.

<sup>18</sup> *In re Smith*, 2 Lack. Leg. N. (Pa.) 152.

<sup>19</sup> *Ex p. Steinman*, 8 W. N. C. (Pa.) 296.

misconduct committed therein,<sup>20</sup> or in the trial court,<sup>1</sup> and this power has been held to exist in intermediate appellate courts.<sup>2</sup> In some jurisdictions appellate courts are designated by statute as the proper tribunal for the hearing of disbarment proceedings,<sup>3</sup> and in others, on appeal thereto, such proceedings are tried *de novo*.<sup>4</sup> So, the Court of Appeals of England, under the judicature acts, has jurisdiction to entertain an application to strike the name of a solicitor from its roll, even though the case does not come before it by appeal.<sup>5</sup>

**§ 768. Inferior Courts.** — An inferior court having no power to admit attorneys to practice, may not revoke a license granted by a superior court.<sup>6</sup> Thus, it has been held that a justice's court has no power to suspend or disbar an attorney.<sup>7</sup> And a like holding has been made as to a court established to "try criminal actions alone."<sup>8</sup> Nor can an attorney be prevented from practicing his profession by a board of county commissioners,<sup>9</sup> or by a court-martial.<sup>10</sup> Nor can a city, by ordinance, confer power upon a police magistrate to disbar attorneys from practicing in his court.<sup>11</sup>

**§ 769. Disbarment from Practicing in Certain Governmental Departments.** — An act of Congress authorizes the secretary of the interior to suspend or exclude from practice before his department any attorney shown to be incompetent or disreputable, or who refuses to comply with the departmental rules and

<sup>20</sup> Compare *Matter of Lambuth*, 18 Wash. 478, 51 Pac. 1071; *Matter of Waugh*, 32 Wash. 58, 72 Pac. 710; *In re Robinson*, 48 Wash. 153, 15 Ann. Cas. 415, 92 Pac. 929, 15 L.R.A. (N.S.) 525.

<sup>1</sup> *People v. Green*, 7 Colo. 237, 3 Pac. 65, 49 Am. Rep. 351; *Ex p. Brown*, 1 How. (Miss.) 303; *In re Thatcher*, 80 Ohio St. 492, 89 N. E. 39.

<sup>2</sup> *St. Louis Court of Appeals, State v. Reynolds*, (Mo.) 158 S. W. 671.

<sup>3</sup> See *supra*, § 764.

<sup>4</sup> See *infra*, § 896.

<sup>5</sup> *In re Whitehead*, 28 Ch. D. (Eng.) 614, 54 L. J. Ch. 796, 52 L. T. N. S. 703, 33 W. R. 601.

<sup>6</sup> See also *Com. v. Richie*, 114 Ky. 366, 70 S. W. 1054; *State v. Laughlin*, 73 Mo. 443.

<sup>7</sup> *Baird v. Justice's Court*, 11 Cal. App. 439, 105 Pac. 259.

<sup>8</sup> *Mattler v. Schaffner*, 53 Ind. 245.

<sup>9</sup> *Garrigus v. State*, 93 Ind. 239.

<sup>10</sup> *State v. Crosby*, 24 Nev. 115, 50 Pac. 127, 77 Am. St. Rep. 786.

<sup>11</sup> *State v. Peabody*, 63 Mo. App. 381.

regulations, or who shall, with intent to defraud, in any manner deceive, mislead, or threaten any claimant, or prospective claimant, by word, circular, letter, or advertisement; <sup>12</sup> and a like provision is made as to attorneys practicing before the treasury department. <sup>13</sup> By merely taking *ex parte* depositions upon which charges are subsequently based against an attorney practicing before the interior department, the secretary of that department does not exceed his jurisdiction. <sup>14</sup> But the secretary acts in excess of his jurisdiction where he considers and bases a disbarment order on charges other than those which an attorney has been cited to answer, and also on a deposition taken without notice. <sup>15</sup>

**§ 770. Jurisdiction to Disbar for Offenses Committed in Another Court.** — Where a particular court is designated by statute as the tribunal for the hearing of disbarment proceedings, such court has jurisdiction to disbar for misconduct occurring in other courts within that jurisdiction. <sup>16</sup> Even in the absence of legislative authority, it has been held that the federal court may disbar one of its attorneys for participating in the unlawful taking of a prisoner from the custody of state officers, and lynching him; <sup>17</sup> and a state court may entertain disbarment proceedings for misconduct committed by an attorney in a federal court, <sup>18</sup> as, for instance, by attacking an officer of the state court in a pleading filed in the federal court. <sup>19</sup> It has also been held that a conviction of crime in a federal court is ground for disbarment in a state court. <sup>20</sup> So, an attorney may be disbarred by the state court for misconduct in a proceeding before officers of the United

<sup>12</sup> 23 Stat. L. 101, § 5; 2 Fed. St. Ann. 16. See also *Garfield v. U. S.*, 32 App. Cas. (D. C.) 109.

<sup>13</sup> 23 Stat. L. 258, § 3; 2 Fed. St. Ann. 16.

<sup>14</sup> *Garfield v. U. S.*, 32 App. Cas. (D. C.) 109.

<sup>15</sup> *Garfield v. U. S.*, 32 App. Cas. (D. C.) 153.

<sup>16</sup> See *supra*, § 764.

<sup>17</sup> *In re Wall*, 13 Fed. 814.

<sup>18</sup> *Matter of Lamb*, 105 App. Div.

462, 94 N. Y. S. 331; *State v. Biggs*, 52 Ore. 433, 97 Pac. 713; *State v. Grover*, 47 Wash. 39, 91 Pac. 564. See also *In re Joseph*, 125 App. Div. 544, 109 N. Y. S. 1018.

<sup>19</sup> *People v. Green*, 9 Colo. 506, 13 Pac. 514.

<sup>20</sup> *Re Kirby*, 10 S. D. 414, 73 N. W. 907, 39 L.R.A. 859. See also *In re Hopkins*, 54 Wash. 569, 103 Pac. 805.

States land office.<sup>1</sup> Nor will the recommendation of a federal judge, before whom an attorney has been convicted of obstructing the administration of justice, prevent a state court from disciplining such attorney, though, undoubtedly, such recommendation will be given due consideration and weight.<sup>2</sup> On the other hand, it has been held that disbarment by a circuit court of appeals for filing a brief containing scandalous matter, was not sufficient ground for disbarment in another circuit. In so deciding, the court said: "I heartily approve of the action of the court of appeals of the second circuit in suspending indefinitely the respondents from practice before that court. The brief which they filed was scandalous and insulting, and richly deserved the punishment that was inflicted; but I have serious doubts whether the circuit court for the eastern district of Pennsylvania, to which they have been admitted to practice, ought to punish them again for this single fault, aggravated though it was. It is quite clear that, while this example of their professional delinquency was aggravated, it falls short of criminal conduct; and I think, therefore, that I should resolve the doubt in their favor concerning the propriety of striking their names from the roll of attorneys of this court, and should merely leave them to feel the well-deserved punishment that was inflicted upon them by the court of appeals for the second circuit."<sup>3</sup>

§ 771. **As to Offenses Committed in Another Jurisdiction.** — It is well settled that the court may disbar an attorney for misconduct committed in another jurisdiction.<sup>4</sup> Thus, an attorney has been disbarred for acting in concert with others in

<sup>1</sup> In re O——, 73 Wis. 602, 42 N. W. 221.

<sup>2</sup> In re Robinson, 140 App. Div. 329, 125 N. Y. S. 193.

<sup>3</sup> Per McPherson, J., in In re Watt, 119 Fed. 1009.

<sup>4</sup> *People v. Gilmore*, 214 Ill. 569, 73 N. E. 737, 69 L.R.A. 791; In re Lamb, 105 App. Div. 462, 94 N. Y. S. 331. See also In re Knott, 71 Cal. 584, 12 Pac. 780; In re Baum, 10 Mont.

223, 25 Pac. 99; In re Kaffenburgh, 188 N. Y. 49, 80 N. E. 570, *affirming* 115 App. Div. 346, 101 N. Y. S. 507; In re Marx, 115 App. Div. 448, 101 N. Y. S. 680; *State v. Biggs*, 52 Ore. 433, 97 Pac. 713; *State v. Grover*, 47 Wash. 39, 91 Pac. 564.

*Compare* In re Ebbs, 150 N. C. 44, 17 Ann. Cas. 592, 63 S. E. 190, 19 L.R.A.(N.S.) 892; *Ex p. Quarrier*, 2 W. Va. 569.

the commission of crime in San Domingo,<sup>5</sup> and for fighting a duel and killing his adversary in another state,<sup>6</sup> and for offenses committed in pursuance of a scheme to defraud certain persons,<sup>7</sup> and for entering into a conspiracy to extort money.<sup>8</sup> Nor can jurisdiction in disbarment proceedings be ousted by the respondent's removal from the state, especially after he has been served with notice.<sup>9</sup> In England an application to strike a solicitor's name from the rolls because of his disbarment in a colonial court for a crime committed therein, was denied because of the insufficiency of proof; but it was intimated that disbarment would be ordered if the commission of the crime had been established.<sup>10</sup> It has been held, however, that the commission of crime in another jurisdiction, although it may be taken into consideration in disbarment proceedings, is insufficient to cause the revocation of an attorney's license.<sup>11</sup>

**§ 772. In England and Canada.** — In England a barrister may be disbarred on his own petition, and this is sometimes done where he wishes to become a solicitor. Where the barrister does not petition, disbarment may be inflicted by the benchers for misconduct; and a bencher who is guilty of misconduct may be disbenched, as well as disbarred.<sup>12</sup> A divisional court of the High Court of Justice may order a solicitor's name to be stricken from all the existing rolls of the former courts consolidated into the High Court of Justice, and may also order his name to be stricken from the register of solicitors of the Supreme Court of Judicature.<sup>13</sup> And a superior court at Westminster has power

<sup>5</sup> *Dormenon's Case*, 1 Mart. O. S. (La.) 129.

<sup>6</sup> *Smith v. State*, 1 Yerg. (Tenn.) 228.

<sup>7</sup> *In re Snyder*, 24 Fed. 910.

<sup>8</sup> *People v. Macauley*, 230 Ill. 208, 82 N. E. 612, 120 Am. St. Rep. 287.

<sup>9</sup> *In re Walkey*, 26 Colo. 161, 56 Pac. 576.

<sup>10</sup> *Ex p. Incorporated Law Soc.*,

[1898] 1 Q. B. (Eng.) 331, 77 L. T. N. S. 661, 67 L. J. Q. B. 245.

<sup>11</sup> *People v. Payson*, 215 Ill. 476, 74 N. E. 383; *People v. Propper*, 220 Ill. 455, 77 N. E. 208. See also *People v. Hahn*, 197 Ill. 137, 64 N. E. 342.

<sup>12</sup> 2 Halsbury's Laws of England 361. And see also *supra*, § 21 et seq., as to the admission of barristers.

<sup>13</sup> *In re Martin*, 24 W. R. (Eng.)

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to strike the name of an attorney from the roll of a court of common pleas of a county.<sup>14</sup>

The law society of Upper Canada has, by statute, the power to disbar attorneys for misconduct after due inquiry by a committee of their number or otherwise.<sup>15</sup> The bar of Montreal is likewise empowered to disbar or suspend its members.<sup>16</sup>

<sup>14</sup> *Ex p. Briggs*, L. R. 8 C. P. (Eng.) 63.

<sup>16</sup> *Le Barreau De Montreal v. Honan*, 8 Quebec Q. B. 26, *affirmed*

<sup>15</sup> *Hinds v. Upper Canada Law Soc.*, 16 Ont. 625.

30 Can. Sup. Ct. 1.

## CHAPTER XXX.

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*Misconduct Generally.*

§ 773. **Misconduct as Cause for Disbarment.**—As the admission of one to practice as an attorney at law, whether considered as a judicial or as a legislative question,<sup>1</sup> makes him an officer of the court,<sup>2</sup> his professional conduct is at all times a subject over which the court may exercise summary jurisdiction should it be required to do so.<sup>3</sup> Indeed, the exercise of such jurisdiction becomes a matter of necessity for the protection of the public, the court, and the members of the bar.<sup>4</sup> Therefore, it is universally conceded that an attorney at law may be removed from office, and his license revoked, for such misconduct as unfits him for the proper performance of his duties.<sup>5</sup> It has been aptly said that too much is staked upon the honesty and good conduct of lawyers for courts to wink at flagrant misconduct. They are trusted by the community with the care of life, liberty and property, with no other security than personal honor and integrity.<sup>6</sup> Since it is presumed that upon the admission of an attorney to the bar, the court inquired into his character, charges of misconduct in transactions occurring before an attorney was admitted to the bar should not be considered in proceedings for his disbarment.<sup>7</sup>

<sup>1</sup> See *supra*, §§ 28, 29. See also *Ex p. Garland*, 4 Wall. 333, 18 U. S. (L. ed.) 366; *People v. Goodrich*, 79 Ill. 148; *People v. Amos*, 246 Ill. 299, 92 N. E. 857, 138 Am. St. Rep. 239.

<sup>2</sup> See *supra*, § 13.

<sup>3</sup> See *supra*, §§ 756-761. See also *In re Durant*, 80 Conn. 140, 10 Am. Cas. 539, 67 Atl. 497.

<sup>4</sup> See *supra*, § 760. See also *In re Stern*, 137 App. Div. 909, 121 N. Y. S. 948.

<sup>5</sup> *Colorado*.—*People v. Essington*, 32 Colo. 168, 75 Pac. 394.

*Kansas*.—*In re Smith*, 73 Kan. 743, 85 Pac. 584.

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*Massachusetts*.—*Boston Bar Assoc. v. Greenhood*, 168 Mass. 169, 46 N. E.

568; *Burrage v. Bristol County*, 210 Mass. 299, 96 N. E. 719.

*Minnesota*.—*State Board of Examiners v. Reynolds*, 98 Minn. 44, 107 N. W. 144.

*Nebraska*.—*In re Newby*, 76 Neb. 482, 107 N. W. 850.

*New York*.—*In re Flower*, 138 App. Div. 102, 122 N. Y. S. 886.

*Pennsylvania*.—*In re Gates*, 1 Pa. Co. Ct. 236.

*West Virginia*.—*State v. McClougherty*, 33 W. Va. 250, 10 S. E. 407.

<sup>6</sup> *Matter of Lyons*, 162 Mo. App. 688, 145 S. W. 844; *In re Henderson*, 88 Tenn. 531, 13 S. W. 413.

<sup>7</sup> *In re Evans*, 94 S. C. 414, 78 S. E. 227.

§ 774. **Nature of Misconduct.** — The word "misconduct" is broad enough to include every cause for which an attorney may be suspended or disbarred. Therefore, it may be stated generally that suspension or disbarment may be ordered for any violation of the oath taken by an attorney on his admission to the bar, or of his duties as a member thereof.<sup>8</sup> Indeed, any conduct violative of the ordinary standards of professional obligations and honor is unprofessional and disreputable;<sup>9</sup> so that, the determination of what constitutes misconduct sufficient to justify suspension or disbarment is frequently, if not invariably, a question to be decided by the court in the exercise of a sound judicial discretion.<sup>10</sup> The nearest approach to a precise definition which will cover the entire subject may be stated thus: an attorney is guilty of misconduct whenever he so acts as to be unworthy of the trust and confidence involved in his official oath, and is found to be wanting in that honesty and integrity which must characterize members of the bar in the performance of their professional duties.<sup>11</sup> The misconduct, however, must be wilful,<sup>12</sup> but it need not be corrupt,<sup>13</sup> or of a criminal nature.<sup>14</sup>

§ 775. **What Constitutes Misconduct Generally.** — In many jurisdictions certain grounds for disbarment are provided for by statute, and of course these will be sufficient in themselves;<sup>15</sup> but, as stated heretofore, the statutory grounds, except-

<sup>8</sup> *Strout v. Proctor*, 71 Me. 288; *State Bank v. Stryker*, 1 Wheeler Crim. (N. Y.) 330; *State v. Martin*, 45 Wash. 76, 87 Pac. 1054.

<sup>9</sup> *Garfield v. U. S.*, 32 App. Cas. (D. C.) 109.

<sup>10</sup> *In re Thatcher*, 190 Fed. 969.

<sup>11</sup> *In re Wall*, 13 Fed. 814; *In re Boone*, 83 Fed. 944; *State v. Harber*, 129 Mo. 271, 31 S. W. 889; *In re Bauder*, 128 App. Div. 346, 112 N. Y. S. 761; *In re Spencer*, 137 App. Div. 330, 122 N. Y. S. 190; *In re Harrington*, 146 App. Div. 219, 130 N. Y. S. 920, *denying rehearing* 140 App. Div. 939, 125 N. Y. S. 1123; *Ex p. Eastham*, 46 Ore. 475, 80 Pac. 1057.

<sup>12</sup> *In re Boone*, 83 Fed. 944; *Ex p. Walls*, 64 Ind. 461. *Compare In re Hobbs*, 75 N. H. 285, 73 Atl. 303, wherein it was said that to constitute cause for disbarment, intentional wrongdoing is not necessary.

<sup>13</sup> *Ex p. Walls*, 64 Ind. 461.

<sup>14</sup> *Underwood v. Com.*, 105 S. W. 151, 32 Ky. L. Rep. 32.

<sup>15</sup> The local laws must be consulted. See also *Boston Bar Assoc. v. Casey*, 213 Mass. 549, 100 N. E. 658; N. Y. Judiciary Law, §§ 88, 477; *Laws of New York* (1912) c. 253; *In re Hart*, 131 App. Div. 661, 116 N. Y. S. 193; *State v. Robinson*, 26 Tex. 367; *Morrison v. Snow*, 26 Utah 247, 72 Pac. 924.

ing in a few jurisdictions, do not prevent the courts from suspending or disbarring attorneys on common-law grounds.<sup>16</sup> The general subdivisions of misconduct which will be sufficient to cause a suspension or disbarment, and which are considered hereinafter, are misconduct toward the court<sup>17</sup> or toward other attorneys;<sup>18</sup> misconduct toward the client,<sup>19</sup> such, for instance, as the appropriation of the client's funds,<sup>20</sup> or the perpetrating, or attempting to perpetrate, a fraud upon him;<sup>1</sup> and misconduct as an official.<sup>2</sup> So, also, disbarment or suspension may be warranted by the filing of scandalous pleadings<sup>3</sup> or briefs,<sup>4</sup> or by fraud in connection with the respondent's admission to the bar,<sup>5</sup> or by perverting justice,<sup>6</sup> or by the commission of crime,<sup>7</sup> or conduct in the nature thereof,<sup>8</sup> or by the suppression or desecration of public records or papers.<sup>9</sup> So, in some instances, suspension or disbarment may be predicated on the fact that an attorney has entered into certain unlawful agreements,<sup>10</sup> or has bought demands for suit,<sup>11</sup> or has solicited business,<sup>12</sup> or has become a moral delinquent.<sup>13</sup>

§ 776. **Ignorance of the Law.**—It has been held that ignorance of the law is not a sufficient ground for the disbarment of an attorney.<sup>14</sup> In that case, however, it appears that, by statute, every citizen of good moral character was entitled, on application, to be admitted to practice as an attorney. The statute did not require any knowledge of the law or the practice thereof, nor were there any educational requisites whatever, and the court said: "It is with a full conviction of the importance of preserving the standard of professional qualifications, that we have been, nevertheless, constrained to come to the result, that ignorance of

<sup>16</sup> See *supra*, §§ 758, 759.

<sup>17</sup> See *infra*, §§ 777-784.

<sup>18</sup> See *infra*, §§ 793, 794.

<sup>19</sup> See *infra*, §§ 795-803.

<sup>20</sup> See *infra*, §§ 804-815.

<sup>1</sup> See *infra*, §§ 796, 797.

<sup>2</sup> See *infra*, §§ 846-848.

<sup>3</sup> See *infra*, § 785.

<sup>4</sup> See *infra*, § 786.

<sup>5</sup> See *infra*, §§ 739, 740.

<sup>6</sup> See *infra*, §§ 816-838.

<sup>7</sup> See *infra*, §§ 853-864.

<sup>8</sup> See *infra*, § 853.

<sup>9</sup> See *infra*, § 828.

<sup>10</sup> See *infra*, §§ 820, 821, 843.

<sup>11</sup> See *infra*, § 843.

<sup>12</sup> See *infra*, §§ 844, 845.

<sup>13</sup> See *infra*, §§ 850-851.

<sup>14</sup> In *re Bryant*, 24 N. H. 149.

the law in an attorney does not authorize the court to suspend or remove him from office, as a contrary doctrine would render it necessary that an attorney should possess some knowledge of the law—a condition which the statute does not require.” But even where knowledge of the law is required, as it is now in every state excepting Indiana, there seems to be no instance of an attorney having been removed because of his ignorance thereof, unless such ignorance has been made manifest by some well-defined misconduct which, in itself, is a ground for disbarment; in that case, of course, it may be assumed that ignorance will be no defense. In this connection it seems worth while to quote from a recent number of the *Green Bag*, whose editor said: “We heartily approve of the suggestion that there should be some means of re-examining the qualifications of a practitioner at the bar, and of suspending from practice those who are incompetent, as well as those who are dishonest or corrupt. In fact, the evil of incompetence is at the present time more serious than that of dishonesty, because no available remedy for it exists.”<sup>15</sup> It is only necessary to add to these remarks that the power of removing law examiners should be exercised as occasion may require; and if they are found to be negligent or incompetent, the court may instruct them in the proper performance of their duties, as was recently done by the court of appeals of New York.<sup>16</sup> Ignorance of the law as excuse or palliation of misconduct is elsewhere discussed.<sup>17</sup>

### *Miscouduct toward Court.*

§ 777. **Generally.** — It is the duty of an attorney not only to be considerate and respectful in his communications with the court, but also, at all times, to refrain from any unfairness in his professional communications and dealings with the judges thereof,<sup>18</sup> and his failure to observe this duty may, of itself, warrant

<sup>15</sup> *Green Bag* for March, 1912, Vol. XXIV., p. 135, approving certain remarks made by Chief Justice Wineh at an annual banquet of the Ohio probate judges at Cleveland.

<sup>16</sup> See Vol. V. Bench and Bar N. S. (May, 1913) 40.

<sup>17</sup> See *infra*, § 878.

<sup>18</sup> *Bradley v. Fisher*, 7 D. C. 32, *affirmed* 13 Wall. 335, 20 U. S. (L. ed.) 646; *Wernimont v. State*, 101

his disbarment.<sup>19</sup> Thus, an attorney may be disbarred where he studiously and systematically attempts to bring the courts into public contempt.<sup>20</sup> And it has been said, that where an attorney indulges in invective or in scandalous innuendo, which tends to degrade the court or impair its usefulness, it is the duty of such court to take such steps as may be necessary to preserve its dignity and good name, and, if necessary to that end, to remove the offender from practicing before it.<sup>1</sup> So too one who exercises the privileges granted to him as an attorney at law is under an obligation to maintain the respect justly due to the court of which he is an officer, and to furnish information of conduct tending to discredit the court or to create suspicion as to the integrity of its members; and a failure to do so, without justification or excuse, is cause for disbarment.<sup>2</sup> It is a mistake to suppose that the practice of the law is a game of hazard, to be won by shift, subterfuge, deception and dissembling. On the contrary, the law requires of those who practice in its courts the strictest observance of truth, integrity, justice and fair dealing in the conduct of all legal proceedings, in and out of court. Indeed, there could scarcely be a greater reproach to a lawyer, than to have it truthfully said that he had gained his case by trick and circumvention.<sup>3</sup>

§ 778. **Deceiving the Court.**—An attorney who deceives the court, or perpetrates, or attempts to perpetrate, a fraud upon it, may be disbarred;<sup>4</sup> and it has been so held where an attorney

Ark. 210, Ann. Cas. 1913D 1156, 142 S. W. 194; In re Pryor, 18 Kan. 72, 26 Am. Rep. 747; Farlin v. Sook, 30 Kan. 401, 1 Pac. 123, 46 Am. Rep. 100; Baur v. Betz, 1 How. Pr. N. S. (N. Y.) 344, 7 Civ. Proc. 233; In re Voss, 11 N. D. 540, 90 N. W. 15; Caples v. State, 3 Okla. Crim. 72, 104 Pac. 493; Simmons v. State, 4 Okla. Crim. 190, 114 Pac. 752, *denying rehearing* 4 Okla. Crim. 489, 112 Pac. 35.

<sup>19</sup> Cobb v. U. S. 172 Fed. 611, 96 C. C. A. 477; In re Woolley, 11 Bush (Ky.) 95.

<sup>20</sup> Bradley v. Fisher, 7 D. C. 32, *affirmed* 13 Wall. 335, 20 U. S. (L. ed.) 646; In re Woolley, 11 Bush (Ky.) 95.

<sup>1</sup> Pittsburgh, C., C. & St. L. R. Co. v. Muncie & P. Traction Co., 163 Ind. 466, 9 Ann. Cas. 165, 77 N. E. 941.

<sup>2</sup> People v. Reaugh, 224 Ill. 541, 79 N. E. 936.

<sup>3</sup> Brooks v. Brooks, 90 N. C. 142.

<sup>4</sup> Wernimont v. State, 101 Ark. 210, Ann. Cas. 1913D 1156, 112 S. W. 194; In re Robinson, 140 App. Div. 329, 125 N. Y. S. 193; In re Freerks, 11

procured an order for alimony by fraud and misrepresentation,<sup>5</sup> and also where an attorney filed a bill for divorce, and obtained a decree, without disclosing to the court that the same bill had been previously dismissed for want of equity by another judge upon substantially the same evidence.<sup>6</sup> An attorney may also be disbarred where he procures the entry of a default judgment by deceiving the court with respect to a motion made by the defendant, under a special appearance, to quash the service of the summons.<sup>7</sup> So, also, where an attorney went on with the trial of a case, the settlement of which he had previously aided in perfecting, and failed to inform the court of such settlement, his conduct was said to be inexcusable, and, for that and other causes, he was disbarred.<sup>8</sup> And where an attorney was employed by the stockholders of a turnpike company to sell its road to a city for a certain sum, and was to be paid all he received above such sum, it was held that he was guilty of deceiving the court by failing to disclose the price placed on the road by his clients.<sup>9</sup> Disbarment may also be ordered for misconduct in deceiving the court as to the good moral character of an applicant for admission to the bar.<sup>10</sup> So, the conduct of a prosecuting attorney in deceiving the court for the purpose of obtaining a certificate for his salary,

N. D. 120, 90 N. W. 265; *In re Henderson*, 88 Tenn. 531, 13 S. W. 413.

*Duty to Notify Court of Clerical Error.*—Under a statute which provided that an attorney shall employ only such means in maintaining an action as are consistent with truth, it has been held to be the duty of an attorney who had based an argument on a clerical error in the record, to admit such error as soon as he discovered it. *Grand Grove U. A. Q. D. v. Garibaldi*, Grove No. 71, 130 Cal. 116, 62 Pac. 486, 80 Am. St. Rep. 80.

*Duty of Calling Court's Attention to Reported Case.*—It has been said that it is the duty of an attorney to direct the court's attention to a reported case which may control a case wherein the attorney is inter-

ested, and the failure to do so, if with the intention of deceiving the court, will be considered, in connection with other grounds, in a proceeding for his disbarment. *Matter of V.*, 10 App. Div. 491, 42 N. Y. S. 268.

<sup>5</sup> *People v. Barrios*, 237 Ill. 527, 86 N. E. 1075.

<sup>6</sup> *People v. Case*, 241 Ill. 279, 89 N. E. 638.

<sup>7</sup> *People v. Hooper*, 218 Ill. 312, 75 N. E. 896.

<sup>8</sup> *State v. Martin*, 45 Wash. 76, 87 Pac. 1054.

<sup>9</sup> *In re Kensington & Oxford Turnpike Road Co.*, 12 Phila. (Pa.) 611, 35 Leg. Int. 152.

<sup>10</sup> *In re Deringer*, 12 Phila. (Pa.) 217, 34 Leg. Int. 248, 4 W. N. C. 200.

has been held to be sufficient to justify his disbarment.<sup>11</sup> So where an attorney, by a course of fraudulent conduct toward the court, postponed the payment of a just claim to which there was no defense, and thereby enabled the debtors to convey away their assets, it was held that he was guilty of such unprofessional conduct as would warrant his suspension from practice.<sup>12</sup> An attorney may also be disbarred for obtaining a continuance by deceiving or misleading the court.<sup>13</sup> But an attorney who applied for a continuance because of the alleged absence of material witnesses, when in fact such witnesses were present, may exonerate himself by showing that he did not know of their presence, and that his application for a continuance was presented in good faith.<sup>14</sup>

Deceiving the court by the presentation of false affidavits or other papers, or by countenancing perjury and suborning witnesses, will be considered in connection with the perversion of justice generally, as a cause for disbarment.<sup>15</sup>

**§ 779. Attack upon Court's Integrity.**—So, a member of the bar who attacks the integrity of the court, or a judge thereof, may be disbarred.<sup>16</sup> Thus, an attorney who repeatedly accused the judge, during the progress of a trial for divorce, of being a member of a combination which induced the plaintiff to institute the divorce proceeding, may be disbarred, especially where he offered no evidence in support of these accusations.<sup>17</sup> So, an attorney may be disbarred where he accuses a judge of falsifying the records of his court,<sup>18</sup> or of having acted oppressively or corruptly.<sup>19</sup>

<sup>11</sup> *In re Jones*, 70 Vt. 71, 39 Atl. 1087.

<sup>12</sup> *In re Goodman*, 135 App. Div. 594, 120 N. Y. S. 801, *affirmed* 199 N. Y. 143, 92 N. E. 211.

<sup>13</sup> *Baker v. State*, 90 Ga. 153, 15 S. E. 788.

<sup>14</sup> *In re Champion*, 24 Okla. 154, 103 Pac. 600.

<sup>15</sup> See *infra*, § 816 et seq.

<sup>16</sup> *Beene v. State*, 22 Ark. 149;

*State v. Root*, 5 N. D. 487, 67 N. W. 590, 57 Am. St. Rep. 568; *Appeal of Scouten*, 186 Pa. St. 270, 42 W. N. C. 227, 40 Atl. 481.

<sup>17</sup> *State v. Maxwell*, 19 Fla. 31.

<sup>18</sup> *People v. Brown*, 17 Colo. 431, 30 Pac. 338.

<sup>19</sup> *People v. Brown*, 17 Colo. 431, 30 Pac. 338; *In re Brown*, 3 Wyo. 121, 4 Pac. 1085.

*Compare Neel v. State*, 9 Ark. 259.



Consideration is given hereinafter to accusations and attacks made in pleadings,<sup>20</sup> briefs,<sup>1</sup> letters,<sup>2</sup> and newspapers.<sup>3</sup>

### § 780. Threatening, Intimidating, or Coercing Judge. —

Any attempt on the part of an attorney to influence the action of a court by threats, coercion, or intimidation, will justify his disbarment.<sup>4</sup> Thus, where an attorney, by letter, charged a judge with an endeavor to conceal facts from the appellate court, and threatened, in the event of an adverse decision in another case, to lay the whole proceedings before the appellate court and the people, he is guilty of unprofessional conduct.<sup>5</sup> So, an attorney may be disbarred where he advises his clients to attempt to influence the action of the court, in a pending suit, by newspaper publications which were calculated to intimidate the judge.<sup>6</sup> To permit conduct of this character to go unpunished, it has been said, would make the bar a fortress for the unprincipled from which they might prey with impunity upon the public without, and attack the court from within.<sup>7</sup> Of course, errors resulting from thoughtlessness which counsel intensely interested, and perhaps lacking a very nice sense of professional propriety, might make, without being guilty of any grave offense, or intention to do wrong, will be overlooked,<sup>8</sup> or passed by with such censure as they may demand.<sup>9</sup> "It is the motive that makes an invasion of the judge's rights a breach of professional fidelity, from which he is to be

50 Am. Dec. 209, wherein it was said that the license of an attorney should not be revoked for fastening a paper at a judge's office door, and wherein the judge was accused of being a base and corrupt man.

<sup>20</sup> See *infra*, § 785.

<sup>1</sup> See *infra*, § 786.

<sup>2</sup> See *infra*, § 787.

<sup>3</sup> See *infra*, §§ 788-790.

<sup>4</sup> Ex p. Coe, 1 McCrary 405, 6 Fed. Cas. No. 2,973; Smith's Appeal, 179 Pa. St. 14, 36 Atl. 134; In re Robinson, 48 Wash. 153, 15 Ann. Cas. 415, 92 Pac. 929, 15 L.R.A.(N.S.) 525.

*A threat of personal chastisement, made by an attorney to a judge out of court for his conduct during the trial of a cause pending, is good ground for striking the attorney from the rolls.* Bradley v. Fisher, 13 Wall. 335, 20 U. S. (L. ed.) 646.

<sup>5</sup> In re Griffin, 1 N. Y. S. 7.

<sup>6</sup> Ex p. Cole, 1 McCrary 405, 6 Fed. Cas. No. 2,973.

<sup>7</sup> In re Smith, 179 Pa. St. 14, 36 Atl. 134.

<sup>8</sup> In re Smith, 179 Pa. St. 14, 36 Atl. 134.

<sup>9</sup> In re Griffin, 1 N. Y. S. 7.

protected for the sake of the public and the suitors of his court, not for his own." <sup>10</sup>

**§ 781. Abuse of Court or Judge Thereof.** — An attorney who so far forgets his duties as an officer of the court, as to be guilty of using offensive language in characterizing the judges thereof, collectively or individually, should be disbarred.<sup>11</sup> It is immaterial whether such language was used in or out of court, or whether it was written <sup>12</sup> or spoken.<sup>13</sup> Thus, it has been held that the authority of an attorney who openly, notoriously, and publicly insults the court, may be revoked, especially where he refuses to atone therefor;<sup>14</sup> and this is true even though the matter in connection with which the court was so abused has been determined.<sup>15</sup> So, the court may disbar an attorney who maligns it.<sup>16</sup>

<sup>10</sup> Per Gibson, J., in *Austin's Case*, 5 Rawle (Pa.) 191, 28 Am. Dec. 657.

<sup>11</sup> *Beene v. State*, 22 Ark. 149; *People v. Green*, 7 Colo. 237, 3 Pac. 65, 49 Am. Rep. 351; *In re Woolley*, 11 Bush (Ky.) 95; *In re Breen*, 30 Nev. 164, 93 Pac. 997, 17 L.R.A. (N.S.) 572; *In re Brown*, 3 Wyo. 121, 4 Pac. 1085.

"Appellate tribunals are created for the sole purpose of correcting judicial errors, and the defeated attorney, if aggrieved, should seek redress by invoking their aid. This is lawyer-like and proper. If, however, the wrath of the attorney is too exuberant to be retained until the appeal is heard, he may go to the nearest tavern and purge himself of it in a manner suited to his temper and the surroundings. Whether such an exhibition is in good taste, or accomplishes any practical purpose, must, in the nature of things, be left to the moral sense and standard of ethics of the particular individual. He is not likely to be called upon in court to justify such a mode of ventilating fancied judicial injustice, and this cir-

cumstance may give license to such conduct. But the attorney must not pollute the atmosphere of the court with billingsgate, or give vent to his wrath within the sacred halls of justice." *In re Griffin*, 1 N. Y. S. 7.

<sup>12</sup> See *infra*, §§ 785-790. See also *In re Woolley*, 11 Bush (Ky.) 95.

*Compare Jackson v. State*, 21 Tex. 668, wherein it was said that scurrilous epithets applied to a judge in vacation time, by an attorney, do not constitute a contempt, within the meaning of a statute authorizing disbarment for contempts involving fraudulent or dishonorable conduct or malpractice.

<sup>13</sup> *State Board of Law Examiners v. Hart*, 104 Minn. 88, 15 Ann. Cas. 197, 116 N. W. 212, 17 L.R.A. (N.S.) 585.

<sup>14</sup> *In re Woolley*, 11 Bush (Ky.) 95.

<sup>15</sup> *State Board of Law Examiners v. Hart*, 104 Minn. 88, 15 Ann. Cas. 197, 116 N. W. 212, 17 L.R.A. (N.S.) 585.

<sup>16</sup> *In re Breen*, 30 Nev. 164, 93 Pac. 997, 17 L.R.A. (N.S.) 572.

§ 782. **Criticising the Court.**—An attorney has a right to comment upon, and to criticise, the rulings of a court, or of any particular judge thereof, providing, of course, that he does so in a fair and becoming manner.<sup>17</sup> So, it has been said that an attorney is not responsible for scrutinizing the conduct of a judge in any way that would not render him liable as a citizen;<sup>18</sup> and that he may also discuss with his client the fitness of a judge before whom his case may come for trial, and the things which may influence him, and advise the client to adopt any means to secure a favorable determination thereof short of corruptly attempting to pervert justice or influence the judge by intimidation or otherwise, without being guilty of an act subjecting him to disbarment.<sup>19</sup> It is indispensable, however, that a criticism of the court shall be in good faith and within the limits of propriety,<sup>20</sup> and the right is transcended when a judicial officer is subjected to scandalous and libelous charges and indignities.<sup>1</sup> Criticism cannot be carried to such an extent as to undermine

<sup>17</sup> *Cobb v. U. S.*, 172 Fed. 641, 96 C. C. A. 477; *State Board of Law Examiners v. Hart*, 104 Minn. 88, 15 Ann. Cas. 197, 116 N. W. 212, 17 L.R.A.(N.S.) 585.

<sup>18</sup> *In re Austin*, 5 Rawle (Pa.) 191, 28 Am. Dec. 657.

<sup>19</sup> *Ex p. Cole*, 1 McCrary 405, 6 Fed. Cas. No. 2,973.

<sup>20</sup> *Arkansas*.—*Beene v. State*, 22 Ark. 149.

*California*.—*In re Collins*, 147 Cal. 8, 81 Pac. 220.

*Colorado*.—*People v. Green*, 7 Colo. 247, 3 Pac. 374, 9 Colo. 506, 13 Pac. 514.

*District of Columbia*.—*In re Adriaans*, 17 App. Cas. 39.

*Kentucky*.—*In re Woolley*, 11 Bush 95.

*New York*.—*Matter of Roekmore*, 127 App. Div. 499, 111 N. Y. S. 879.

*Ohio*.—*In re Thatcher*, 80 Ohio St. 492, 89 N. E. 39.

*Pennsylvania*.—*In re Austin*, 5 Rawle 205, 28 Am. Dec. 657.

<sup>1</sup> *Cobb v. U. S.*, 172 Fed. 641, 96 C. C. A. 477.

Language to the effect that the court's ruling is directly contrary to every principle of law is insulting and disrespectful. *In re Pryor*, 18 Kan. 72, 26 Am. Rep. 747.

So, the language of an attorney, while acting in the capacity of a district judge, but not used in any judicial proceeding pending before him, to the effect that the opinion of the appellate court was neither fair to the prosecuting attorney nor to the district court, and whether or not it was made for the purpose of bolstering up a decision which was neither founded on law nor supported by fact, and was a palpable reversal of a case which for forty years had been the accepted law in the state, it was "highly reprehensible for its author or authors to have made it

public confidence in the due administration of justice.<sup>2</sup> That improper criticism is made by way of the pleadings of the parties, or the briefs of their counsel, does not render it any the less objectionable;<sup>3</sup> nor is it material whether it was made within or without the courtroom, or by unofficial communications addressed to the judge.<sup>4</sup> The incorporation in pleadings, briefs,

. . . reprehensible if the court knew what it was doing, pitiful if it did not." was held not to be within the province of legitimate criticism, but was an unwarranted attack on the court, for which the attorney might be disbarred. In re Breen, 30 Nev. 164, 93 Pac. 997, 17 L.R.A. (N.S.) 572.

<sup>2</sup> *United States*.—U. S. v. Green, 85 Fed. 857.

*Colorado*.—People v. Brown, 17 Colo. 431, 30 Pac. 338.

*Nevada*.—In re Breen, 30 Nev. 164, 93 Pac. 997, 17 L.R.A. (N.S.) 572.

*New York*.—Matter of Rockmore, 127 App. Div. 499, 111 N. Y. S. 879.

*Ohio*.—In re Thatcher, 80 Ohio St. 492, 89 N. E. 39.

*Oklahoma*.—State Bar Commission v. Sullivan, 35 Okla. 745, 131 Pac. 703.

*Wyoming*.—In re Brown, 3 Wyo. 121, 4 Pac. 1085.

<sup>3</sup> *United States*.—In re Hastings, 4 Amer. L. Rev. 173, 11 Fed. Cas. No. 6,199.

*California*.—See In re Philbrook, 105 Cal. 471, 38 Pac. 511, 884, 45 Am. St. Rep. 59.

*Colorado*.—People v. Green, 9 Colo. 506, 13 Pac. 514; People v. Brown, 17 Colo. 431, 30 Pac. 338.

*District of Columbia*.—In re Adriaans, 17 App. Cas. 39.

*Florida*.—State v. Maxwell, 19 Fla. 31.

*Indiana*.—See Ex p. Smith, 28 Ind. 47.

*Kentucky*.—In re Woolley, 11 Bush 95.

*Louisiana*.—De Armas's Case, 10 Mart. 123.

*Michigan*.—In re Mains, 121 Mich. 603, 80 N. W. 714.

*Nevada*.—In re Breen, 30 Nev. 164, 93 Pac. 997, 17 L.R.A. (N.S.) 572.

*New York*.—In re Murray, 58 Hun 604 mem., 11 N. Y. S. 336; Matter of Rockmore, 127 App. Div. 499, 111 N. Y. S. 879.

*Virginia*.—See Ex p. Fisher, 6 Leigh 619.

*Washington*.—In re Lambuth, 18 Wash. 478, 51 Pac. 1071; In re Robinson, 48 Wash. 153, 15 Ann. Cas. 415, 92 Pac. 929, 15 L.R.A. (N.S.) 525.

And see *infra*, §§ 785-786.

<sup>4</sup> *England*.—See Matter of Ludlow Charities, 2 Myl. & C. 316.

*Alabama*.—See Johnson v. State, 152 Ala. 93, 44 So. 671.

*Arkansas*.—Beene v. State, 22 Ark. 149.

*California*.—In re Collins, 147 Cal. 8, 81 Pac. 220.

*New York*.—In re Wilkes, 3 N. Y. S. 753.

*North Dakota*.—See State v. Root, 5 N. D. 487, 67 N. W. 590, 57 Am. St. Rep. 568.

*Ohio*.—In re Thatcher, 80 Ohio St. 492, 89 N. E. 39.

*Pennsylvania*.—Smith's Appeal,

and other writings, of abusive language or undue criticism, is specifically considered in the subdivision following.<sup>5</sup>

**§ 783. Criticism After Termination of Cause.**—As the purpose of the rule against improper criticism of judges is primarily to prevent the impairment of the administration of justice, it is applied with less strictness where the cause, in connection with which the criticism was made, has been determined.<sup>6</sup> And in some jurisdictions criticism of this character is not sufficient to warrant disbarment,<sup>7</sup> unless it appears to be so base and vile as to establish clearly the attorney's unfitness to remain a member of an honorable profession.<sup>8</sup>

**§ 784. Disavowal and Apology.**—An attorney who has been guilty of misconduct toward the court can, in most instances, avert the consequences of his wrong by disavowing any intentional disrespect, and apologizing to the court; and this is the proper course to pursue by one who allows the heat of an argument to set aside his discretion.<sup>9</sup> But where the language used is unambiguous, and of such a character as to bring the court into contempt, a disavowal of any disrespectful meaning will not purge the words used of their ordinary signification, for every one is presumed to intend the natural consequences of his acts.<sup>10</sup> The

179 Pa. St. 14, 36 Atl. 134; *Scouten's Appeal*, 186 Pa. St. 270, 40 Atl. 481.

*West Virginia*.—*State v. McClaugherty*, 33 W. Va. 250, 10 S. E. 407.

*Wyoming*.—*In re Brown*, 3 Wyo. 121, 4 Pac. 1085.

<sup>5</sup> See *infra*, §§ 785-790.

<sup>6</sup> *In re Pryor*, 18 Kan. 72, 26 Am. Rep. 747. See also *In re Thompson*, 46 Kan. 254, 26 Pac. 674.

<sup>7</sup> *State Board of Law Examiners v. Hart*, 104 Minn. 88, 15 Ann. Cas. 197, 116 N. W. 212, 17 L.R.A.(N.S.) 585; *In re Egan*, 24 S. D. 301, 123 N. W. 478. Compare *In re Breen*, 30 Nev. 164, 93 Pac. 997, 17 L.R.A.(N.S.) 572.

<sup>8</sup> *State Board of Law Examiners v. Hart*, 104 Minn. 88, 15 Ann. Cas. 197, 116 N. W. 212, 17 L.R.A.(N.S.) 585.

<sup>9</sup> *In re Manheim*, 113 App. Div. 136, 99 N. Y. S. 87; *In re Griffin*, 1 N. Y. S. 7; *Ex p. Biggs*, 64 N. C. 214.

<sup>10</sup> *Colorado*.—*People v. Green*, 7 Colo. 237, 3 Pac. 65, 49 Am. Rep. 351.

*Kentucky*.—*In re Woolley*, 11 Bush 111.

*Nevada*.—*In re Breen*, 30 Nev. 164, 93 Pac. 997, 17 L.R.A.(N.S.) 572.

*Pennsylvania*.—*Smith's Appeal*, 179 Pa. St. 14, 36 Atl. 134.

*West Virginia*.—*State v. McClaugherty*, 33 W. Va. 250, 10 S. E. 407.

disavowal, however, will be considered in mitigation of punishment;<sup>11</sup> and if the court is satisfied that no intentional disrespect was meant, the offender will not be disbarred,<sup>12</sup> but he may escape with a reprimand,<sup>13</sup> or a temporary suspension.<sup>14</sup> On the other hand, the fact that an attorney refuses to apologize when his error is brought to his attention, will also be taken into consideration and weighed against him.<sup>15</sup>

*In Pleadings, Briefs, and Other Writings.*

§ 785. **Statements in Pleadings.** — A lawyer cannot use the pleadings in a cause, or papers in the nature of pleadings, as a means for abusing the court; and if he does so, he may be disbarred.<sup>16</sup> Thus, disbarment may follow from the making of charges, in a pleading or other paper in the nature thereof, which attacks the integrity of the court,<sup>17</sup> or which charges the court or any judge thereof with being corrupt,<sup>18</sup> as, for instance, where a trial judge is charged with having maliciously promoted litigation in order that he might receive the fruits thereof,<sup>19</sup> or with having taken a bribe,<sup>20</sup> or with usurpation of office,<sup>1</sup> or with hav-

See also *In re Egan*, 24 S. D. 301, 123 N. W. 478, in which McCoy, J., said of such a disavowal: "The only legitimate inference is that his memory is sadly deficient or his conception of the truth very limited."

<sup>11</sup> *Ex p. Cole*, 1 McCrary 405, 6 Fed. Cas. No. 2,973; *People v. Green*, 9 Colo. 506, 13 Pac. 514; *In re Breen*, 30 Nev. 164, 93 Pac. 997, 17 L.R.A. (N.S.) 572; *In re Lambuth*, 18 Wash. 478, 51 Pac. 1071; *In re Robinson*, 48 Wash. 153, 15 Ann. Cas. 415, 92 Pac. 929, 15 L.R.A. (N.S.) 525.

<sup>12</sup> *In re Lambuth*, 18 Wash. 478, 51 Pac. 1071.

<sup>13</sup> *Matter of Manheim*, 113 App. Div. 136, 99 N. Y. S. 87.

<sup>14</sup> *In re Robinson*, 48 Wash. 153, 15 Ann. Cas. 415, 92 Pac. 929, 15 L.R.A. (N.S.) 525.

<sup>15</sup> *In re Pryor*, 18 Kan. 72, 26 Am. Rep. 747.

<sup>16</sup> *In re Woolley*, 11 Bush (Ky.) 95; *In re De Armas*, 10 Mart. O. S. (La.) 123; *Morrison v. Snow*, 26 Utah 247, 72 Pac. 924.

<sup>17</sup> *Liddicoat v. Treglown*, 6 Colo. 47; *In re Mains*, 121 Mich. 603, 80 N. W. 714, 6 Detroit Leg. N. 589; *In re Rockmore*, 127 App. Div. 499, 141 N. Y. S. 879. And see also *supra*, §§ 781, 782.

<sup>18</sup> *In re Murray*, 58 Hun 604 mem., 14 N. Y. S. 336.

<sup>19</sup> *In re Snow*, 27 Utah 265, 75 Pac. 741.

<sup>20</sup> *People v. Green*, 9 Colo. 506, 13 Pac. 514; *In re Mains*, 121 Mich. 603, 80 N. W. 714, 6 Detroit Leg. N. 589.

<sup>1</sup> *In re Adriaans*, 17 App. Cas. (D. C.) 39.

ing decided a case without consideration or deliberation, or an examination of the pleadings, proofs, or written arguments, as the result "of either prejudice or corruption," and in "wilful violation of a known duty."<sup>2</sup> So, it is unprofessional conduct in an attorney to incorporate improper criticisms of the court or any of its judges in a pleading,<sup>3</sup> and it has been so held where an attorney charged a judge with "outrageous, persistent, continued illegal and unlawful rulings."<sup>4</sup> It is also ground for disbarment to charge a judge with favoritism toward a particular attorney,<sup>5</sup> or to incorporate in a petition for rehearing a statement to the effect that it was rumored that certain judges would vote in the interest of a political ring, and to intimate that a reinstatement of the cause was the only way to escape from further scandalous rumors.<sup>6</sup> While, under a statute in Oklahoma, an attorney cannot be disbarred for filing a pleading, a petition with a pamphlet attached which falsely and maliciously attacks the courts and judges may be considered as evidence of the attorney's unfitness to practice law.<sup>7</sup> Where, however, it appears that charges of the character under consideration have been made in good faith, and without malice, a temporary suspension from practice may be deemed to be a sufficient chastisement.<sup>8</sup> So, a frank disavowal of any intentional reflection upon the honor of the court or any of its judges, accompanied with an apology, will be taken into consideration in mitigation of punishment;<sup>9</sup> but, as stated heretofore,<sup>10</sup> the language used cannot be purged of its ordinary meaning.<sup>11</sup> It has been held that the filing of scandalous pleadings in a federal circuit court of appeals, and even a disbarment in such court

<sup>2</sup> *In re Hastings*, 4 Am. L. Rev. 173, 11 Fed. Cas. No. 6,199.

<sup>3</sup> *In re Rockmore*, 127 App. Div. 499, 111 N. Y. S. 879. And see also *supra*, § 782.

<sup>4</sup> *In re Mains*, 121 Mich. 603, 80 N. W. 714, 6 Detroit Leg. N. 589.

<sup>5</sup> *Matter of Rockmore*, 127 App. Div. 499, 111 N. Y. S. 879.

<sup>6</sup> *In re Robinson*, 48 Wash. 153, 15 Ann. Cas. 415, 92 Pac. 929, 15 L.R.A. (N.S.) 525.

<sup>7</sup> *State Bar Commission v. Sullivan*, 35 Okla. 745, 131 Pac. 703.

<sup>8</sup> *People v. Green*, 9 Colo. 506, 13 Pac. 514; *In re Robinson*, 48 Wash. 153, 15 Ann. Cas. 415, 92 Pac. 929, 15 L.R.A. (N.S.) 525.

<sup>9</sup> *In re Lambuth*, 18 Wash. 478, 51 Pac. 1071.

<sup>10</sup> See *supra*, § 784.

<sup>11</sup> *In re Rockmore*, 127 App. Div. 499, 111 N. Y. S. 879; *In re Snow*, 27 Utah 265, 75 Pac. 741.

because thereof, will not, in itself, constitute a sufficient ground for the disbarment of the offender from the federal courts of another circuit.<sup>12</sup>

**§ 786. Statements in Briefs.** — A brief cannot be used as a vehicle for the expression of hatred, contempt, insult, disrespect, or professional discourtesy of any nature; and briefs which offend in these particulars may be stricken from the files.<sup>13</sup> So, written or printed arguments of this character constitute a contempt of court,<sup>14</sup> and the attorney who presents them may be prohibited from proceeding further with the cause, without prejudice to any other proceeding to punish him for his misconduct.<sup>15</sup> And disbarment may be predicated on scandalous matter stated in a brief; thus, an attorney may be disbarred for abuse of the judges who decided the case in the court below.<sup>16</sup> So, an open, notorious, and public insult to the court by an attorney, in a brief on review, may justify his suspension.<sup>17</sup> And an attorney who characterizes one of the judges of the appellate court as a corrupt person, and alleges that, should the decision of the court be adverse, the general public will see that the court is corrupt, should be suspended from practice.<sup>18</sup>

**§ 787. Statements in Letters Written to Judge.** — Counsel who incorporates in a letter, written to a judge, state-

<sup>12</sup> In *re* Watt, 149 Fed. 1009.

*Compare* *People v. Green*, 9 Colo. 506, 13 Pac. 514, wherein it was held that a state court may disbar an attorney because of allegations contained in a bill filed in a federal court.

And see also *supra*, § 763, as to the effect of disbarment generally.

<sup>13</sup> *Pittsburgh, C., C. & St. L. R. Co. v. Muncie & P. Traction Co.*, 166 Ind. 466, 9 Ann. Cas. 165, 77 N. E. 941.

<sup>14</sup> In *re* Woolley, 11 Bush (Ky.) 95.

And see also *infra*, §§ 791-792.

<sup>15</sup> *Rahles v. J. Thompson & Sons Mfg. Co.*, 137 Wis. 506, 119 N. W. 289, 23 L.R.A.(N.S.) 296.

<sup>16</sup> *Kelley v. Boettcher*, 82 Fed. 794, 49 U. S. App. 620, 27 C. C. A. 177; *U. S. v. Green*, 85 Fed. 857.

<sup>17</sup> In *re* Dunn, 85 Neb. 606, 124 N. W. 120.

<sup>18</sup> In *re* Philbrook, 105 Cal. 471, 38 Pac. 511, 884, 45 Am. St. Rep. 59.

And see also *supra*, § 780, as to threatening, intimidating, or coercing judges generally.



ments which are abusive or insulting, or which reflect upon the character or integrity of the judge, or the court of which he is a member, may be disbarred.<sup>19</sup> And where an attorney stated, in such a letter, that he had been informed that the judge had visited a prisoner at the jail during the night, and expressed sorrow for him and dislike for his attorney, and that the writer had no patience or respect for a judge who would so far forget his oath as to meet at night with the county solicitor and discuss how and why a certain man should be tried, and that in the future the writer desired the judge to act the gentleman toward him in court, and that the judge would have to do so outside or the writer would know why, it was held that such statements constituted ground for disbarment.<sup>20</sup> So, where an attorney, in a letter written to a judge, threatened, in the event of an adverse decision in a certain case, to present grievances to the appellate court and the people, his conduct was held to be unprofessional.<sup>1</sup> It is also unprofessional conduct for an attorney to write to a judge, regarding a decision rendered by him, that "it is not law; neither is it common sense; the result is, I have been robbed of eighty dollars."<sup>2</sup> But a letter written on impulse, without any intentional reflection on the integrity of the judge, may be overlooked, and an apology accepted.<sup>3</sup> So, a letter couched in respectful language, written to a judge in answer to one from him, and which suggested, by way of answer, that the judge had lost the confidence of the public, and that his retirement might restore it, has been held not to be such a breach of professional duty as would warrant the writer's disbarment.<sup>4</sup>

**§ 788. Libeling the Court.** — An attorney who is guilty of writing and publishing a libelous charge against the court, or any member thereof, in respect to his official conduct, or who procures

<sup>19</sup> State Board of Law Examiners *v.* Hart, 104 Minn. 88, 15 Ann. Cas. 197, 116 N. W. 212, 17 L.R.A.(N.S.) 585; *In re Griffin*, 1 N. Y. S. 7; *In re Smith*, 2 Lack. Leg. N. (Pa.) 152.

<sup>20</sup> *Johnson v. State*, 152 Ala. 93, 44 So. 671.

<sup>1</sup> *In re Griffin*, 1 N. Y. S. 7.

<sup>2</sup> *In re Wilkes*, 3 N. Y. S. 753.

<sup>3</sup> *In re Manheim*, 113 App. Div. 136, 99 N. Y. S. 87.

And see also *supra*, § 784, as to disavowal and apology generally.

<sup>4</sup> *In re Austin*, 5 Rawle (Pa.) 191, 28 Am. Dec. 657.

the writing or publication of such a charge, may, and should be, disbarred from further practice.<sup>5</sup> Thus, it is cause for disbarment where an attorney directly procures or instigates the widespread publication, in a newspaper, of false and malicious charges which reflect on the integrity and official conduct of a judge, before whom a cause is pending, for the purpose of improperly influencing or unjustly discrediting his action.<sup>6</sup> Even where a judge is a candidate for re-election, an attorney may be disbarred for publishing, or procuring the publication of, false and scandalous accusations against him; and the question at issue, in such a case, is whether the attorney's conduct sufficiently shows his unfitness as a member of the bar.<sup>7</sup> The deliberate publication of an accusation in a newspaper, even though it be false, gives to it a gravity which verbal criticism does not possess,<sup>8</sup> and the wrong is aggravated and intensified when it is the act of a sworn officer of the court. "To call such an act 'misconduct' simply, is to express but little of its vileness."<sup>9</sup> Nor will the disclaimer of malice, although it may be taken into consideration, purge the language used of its venom.<sup>10</sup> A reaffirmance of the truthfulness of the published charges will be deemed to be an aggravation thereof.<sup>11</sup>

### § 789. Where Attorney Is Also Editor of Newspaper. —

Nor can an attorney at law shield himself, as against a charge of having libeled the court or a judge thereof, by pleading that he is also the editor of the newspaper wherein the charges were published. His position at the bar enables him, in such case, to inflict

<sup>5</sup> *U. S. v. Green*, 85 Fed. 857; *Cobb v. U. S.*, 172 Fed. 641, 96 C. C. A. 477; *In re Collins*, 147 Cal. 8, 81 Pac. 220; *State v. McClaugherty*, 33 W. Va. 250, 10 S. E. 407.

<sup>6</sup> *In re Collins*, 147 Cal. 8, 81 Pac. 220.

*In re Wilcox*, (Kan.) 133 Pac. 547, the evidence was held to sustain an accusation that the purpose of a libel published by an attorney was to defeat the administration of justice, and that the charge so seriously affected his professional integrity as to

require disbarment. And see also *supra*, § 780.

<sup>7</sup> *In re Thatcher*, 80 Ohio St. 492, 89 N. E. 39.

<sup>8</sup> *Cobb v. U. S.*, 172 Fed. 641, 96 C. C. A. 477.

<sup>9</sup> *State v. McClaugherty*, 33 W. Va. 250, 10 S. E. 407.

<sup>10</sup> *Cobb v. U. S.*, 179 Fed. 641, 96 C. C. A. 477; *State v. McClaugherty*, 33 W. Va. 250, 10 S. E. 407. And see also *supra*, § 784. Compare *Ex p. Biggs*, 64 N. C. 202.

<sup>11</sup> *U. S. v. Green*, 85 Fed. 857.

the greater wound, and he may be deprived of the privileges and character which it gives him, by suspension or expulsion, without infringing on the freedom of the press.<sup>12</sup> But an attorney, who also edits a newspaper, will not be disbarred merely because of the publication of a misrepresentation of the facts connected with the trial of a cause in the court wherein he practices as an attorney.<sup>13</sup> Nor will a publication, in such cases, be ground for disbarment merely because the motives therefor were a desire for notoriety, partisan malice, and a wilful, headlong zeal to promote partisan interests.<sup>14</sup>

### § 790. Fair Criticism as Distinguished from Libel.—

It must not, however, be understood that a lawyer, whether he also edits a newspaper or not, cannot fairly criticise, and publish his opinion of, the action of a court or judge thereof.<sup>15</sup> Thus, in speaking of a provision of the bill of rights in the Pennsylvania constitution, which provided that "no conviction shall be had in any prosecution for the publication of papers relating to the official conduct of officers or men in public capacity, or to any other matter proper for public investigation or information, where the fact that such publication was not maliciously or negligently made shall be established to the satisfaction of the jury," Chief Justice Sharswood said: "It would be a clear infraction of the spirit if not the letter of this article to hold that an attorney can be summarily disbarred for the publication of a libel on a man in a public capacity, or where the matter was proper for public investigation or information; for as he certainly does not forfeit his constitutional rights as a freeman by becoming an attorney, it guarantees

<sup>12</sup> *In re Greevy*, 4 W. N. C. (Pa.) 308. See also *In re Egan*, 24 S. D. 301, 123 N. W. 478.

In *Ex p. Biggs*, 64 N. C. 202, it was held that the answer of an attorney who was charged with having libeled the court in a newspaper which he edited was sufficiently atoned for by a disavowal of any wrongful intention. And see also *supra*, § 784.

<sup>13</sup> *In re Greevy*, 4 W. N. C. (Pa.) 308. See also the following section.

<sup>14</sup> *Ex p. Steinman*, 95 Pa. St. 220, 40 Am. Rep. 637, *reversing* 8 W. N. C. 296.

<sup>15</sup> *Cobb v. U. S.*, 172 Fed. 641, 96 C. C. A. 477; *In re Thatcher*, 80 Ohio St. 492, 89 N. E. 39; *Ex p. Steinman*, 95 Pa. St. 220, 40 Am. Rep. 637, *reversing* 8 W. N. C. 296.

And see also *supra*, § 782, as to criticism of the court generally.

to him immunity from all liability to punishment" excepting as therein provided. The distinguished jurist continued: "We need not say that the case is altered, and that it is now the right and the duty of a lawyer to bring to the notice of the people who elect the judges every instance of what he believes to be corruption or partisanship. No class of the community ought to be allowed freer scope in the expression or publication of opinions as to the capacity, impartiality or integrity of judges than members of the bar. They have the best opportunities of observing and forming a correct judgment. They are in constant attendance on the courts. Hundreds of those who are called on to vote never enter a courthouse, or if they do, it is only at intervals as jurors, witnesses or parties. To say that an attorney can only act or speak on this subject under liability to be called to account and to be deprived of his profession and livelihood by the very judge or judges whom he may consider it his duty to attack and expose, is a position too monstrous to be entertained for a moment."<sup>16</sup> The greatest latitude should be allowed in the criticism of the decisions of judges who are candidates for re-election.<sup>17</sup> So, the presentation of charges against a judicial officer, in good faith and through the proper channel, is a matter of legal right.<sup>18</sup> And where a letter addressed to a judge in respectful language, in response to one from him, was not, in itself, a breach of professional fidelity, its character was not altered by the publication of the correspondence in a newspaper by an attorney for the purpose of defending his own reputation, and not to assail the judge.<sup>19</sup> The motive with which a publication has been made, it seems, is always entitled to consideration.<sup>20</sup>

<sup>16</sup> *Ex p. Steinman*, 95 Pa. St. 220, 40 Am. Rep. 637, *reversing* 8 W. N. C. 296.

<sup>17</sup> *State v. Crenit Ct.*, 97 Wis. 1, 72 N. W. 193, 65 Am. St. Rep. 90, 38 L.R.A. 554.

<sup>18</sup> *In re Collins*, 147 Cal. 8, 81 Pac. 220; *In re Rockmore*, 127 App. Div. 499, 111 N. Y. S. 879.

<sup>19</sup> *In re Austin*, 5 Rawle (Pa.) 191, 28 Am. Dec. 657.

<sup>20</sup> *In re Austin*, 5 Rawle (Pa.) 191, 28 Am. Dec. 657; *Ex p. Steinman*, 95 Pa. St. 220, 40 Am. Rep. 637, *reversing* 8 W. N. C. 296.

*Contempt of Court.*

§ 791. **Generally.** — Attorneys at law are subject to fine or other punishment for contempts of court committed by them;<sup>1</sup> and such contempt may appear from a refusal to obey any lawful order of the court, or by offense or insult offered to the court or to any of the judges thereof, or by any improper interference with the due administration of justice.<sup>2</sup> It is not every indiscretion, however, which will amount to a contempt.<sup>3</sup> It is never a contempt for an attorney to advise his client of his legal rights and remedies; and, therefore, an attorney is not chargeable with contempt for advising the filing of a petition in bankruptcy, even though the client was undergoing examination in supplementary proceedings, and had been enjoined from disposing of his property.<sup>4</sup> Nor is an attorney guilty of contempt where he advises a client that she may go where she pleases, and loans her money for that purpose, merely because she has been released from arrest on habeas corpus proceedings for a hearing as to her mental condition.<sup>5</sup> And where an attorney advised a client who was indicted and under bail on a charge of assault and battery, that if he could not procure a continuance of the cause on an affidavit, the client could leave the jurisdiction and forfeit his recognizance, which would work a continuance until the next term, it was held that he was not guilty of a contempt of court.<sup>6</sup> Nor is an attorney guilty of a contempt of court where he refuses to testify in a certain matter on the ground that his answers may tend to incriminate him.<sup>7</sup> Where a contempt has been committed, it may be explained or disavowed and an apology offered, and this is usually the best course to pursue;<sup>8</sup> but, as stated heretofore in another connection,<sup>9</sup>

<sup>1</sup> Ex p. Cole, 1 McCrary 405, 6 Fed. Cas. No. 2,973; Butler v. People, 2 Colo. 295; Ex p. Robbins, 63 N. C. 309.

<sup>2</sup> In re Woolley, 11 Bush (Ky.) 95; State v. Redmond, 9 La. Ann. 319; Watson v. Citizens' Sav. Bank, 5 S. C. 159.

<sup>3</sup> Ex p. Robbins, 63 N. C. 309; Wise v. Com., 97 Va. 779, 34 S. E. 453.

<sup>4</sup> In re Kepecs, 123 N. Y. S. 872.

<sup>5</sup> Edge v. Com., 139 Ky. 252, 129 S. W. 591.

<sup>6</sup> Ingle v. State, 8 Blackf. (Ind.) 574.

<sup>7</sup> In re Kaffenburgh, 188 N. Y. 49, 80 N. E. 570, *affirming* 115 App. Div. 346, 101 N. Y. S. 507.

<sup>8</sup> Slater v. Merritt, 75 N. Y. 268; Ex p. Biggs, 64 N. C. 202.

<sup>9</sup> See *supra*, § 784.

where the matter is of itself necessarily a contempt, a disavowal, though it may tend to excuse, cannot justify the act.<sup>10</sup>

§ 792. **Contempt as Ground for Disbarment.**—A contempt of court may be of such a character as to warrant disbarment;<sup>11</sup> indeed, nearly every ground of disbarment is, in itself, a contempt of court; but, on the other hand, it is clear that a contempt of court may frequently occur, and be punishable as such, although the character thereof is not of sufficient gravity to constitute ground for disbarment. The power to disbar an attorney for cause shown is distinct from the power to punish him for contempt.<sup>12</sup> In order to justify disbarment for contempt of court, an attorney's conduct should be so serious as to render him unfitted for his office,<sup>13</sup> as, for instance, where he has been guilty of flagrantly insulting the court, or any judge thereof,<sup>14</sup> or has refused to obey its lawful orders;<sup>15</sup> but it is not contempt to appeal from an order of the court rather than submit thereto,<sup>16</sup> and this is especially true where the order is reversed on appeal.<sup>17</sup> Nor will an attorney be disbarred for his neglect to appear before an examiner as a witness.<sup>18</sup> In the determination of disbarment proceedings, based upon a contempt of court, due consideration will be given to extenuating circumstances which tend to show that no intentional disrespect either for the law or the court was meant. Thus, the court will consider a disavowal and apology, and these, together with other facts which go to show that the attorney acted in good faith, or was actuated by sudden impulse, or that the language used or acts done do not bear an objectionable

<sup>10</sup> *In re Woolley*, 11 Bush (Ky.) 95.

<sup>11</sup> *In re Woolley*, 11 Bush (Ky.) 95; *State v. Root*, 5 N. D. 487, 67 N. W. 596, 57 Am. St. Rep. 568. See also *In re Elliott*, 18 S. D. 264, 100 N. W. 431.

<sup>12</sup> *Ex p. Robinson*, 19 Wall. 505, 22 U. S. (L. ed.) 205; *In re Adriaans*, 17 App. Cas. (D. C.) 39.

<sup>13</sup> *Ex p. Robinson*, 19 Wall. 505, 22 U. S. (L. ed.) 205; *Watson v. Citizens' Sav. Bank*, 5 S. C. 159.

<sup>14</sup> *In re Woolley*, 11 Bush (Ky.) 95.

<sup>15</sup> *Jeffries v. Laurie*, 23 Fed. 786, 27 Fed. 195; *In re Burris*, 101 Cal. 624, 36 Pac. 101; *People v. Salomon*, 184 Ill. 490, 56 N. E. 815; *In re Radford*, 168 Mich. 474, 134 N. W. 472.

<sup>16</sup> *Hendrick v. Posey*, 104 Ky. 8, 45 S. W. 525, 46 S. W. 702, 20 Ky. L. Rep. 359.

<sup>17</sup> *Garrigus v. State*, 93 Ind. 239.

<sup>18</sup> *Com. v. Newton*, 1 Grant Cas. (Pa.) 453.

construction when explained, will tend to avert disbarment.<sup>19</sup> Irrespective of the character of the contempt, disbarment should not be ordered therefor in the contempt proceedings,<sup>20</sup> nor is it proper for the court, in proceedings for contempt, to order an attorney's disbarment if he fails to purge himself of the contempt.<sup>1</sup>

*Misconduct toward Attorneys.*

**§ 793. Fair and Honorable Treatment Essential. —**

A proper respect for the due administration of justice requires that an attorney at law should be fair and honorable, not only with the court and his client, but also with fellow-members of the bar, especially where they represent his client's adversary.<sup>2</sup> "Nothing is more certain than that the practitioner will find, in the long run, the good opinion of his professional brethren of more importance than that of what is commonly called the public. The foundations of the reputation of every truly great lawyer will be discovered to have been laid here," says an eminent author and jurist.<sup>3</sup> It has been held to be ground for disbarment for an attorney to intermeddle between a brother attorney and his client, to slander the former, and to endeavor to induce the client to forsake him and follow the intermeddler instead.<sup>4</sup> Nor is it any defense, in a proceeding for disbarment on the ground of having made false and scandalous statements of a fellow-member of the bar, that such statements do not constitute a technical or indictable

<sup>19</sup> See *supra*, § 784. See also *In re Lizotte*, 32 R. I. 386, 79 Atl. 960, 35 L.R.A.(N.S.) 794.

<sup>20</sup> *People v. Kavanagh*, 220 Ill. 49, 77 N. E. 107, 110 Am. St. Rep. 223; *State v. Root*, 5 N. D. 487, 67 N. W. 590, 57 Am. St. Rep. 568. And see also *infra*, § 871.

<sup>1</sup> *Ex p. Kearby*, 35 Tex. Crim. 634, 34 S. W. 962; *State v. Sachs*, 2 Wash. 373, 26 Pac. 865, 26 Am. St. Rep. 857.

<sup>2</sup> *Wernimont v. State*, 101 Ark. 210, Ann. Cas. 1913D 1156, 142 S. W. 194; *Brooks v. Brooks*, 90 N. C. 142; *Caples v. State*, 3 Okla. Crim. 72, 104

Pac. 493, 26 L.R.A.(N.S.) 1033; *Simmons v. State*, 4 Okla. Crim. 490, 114 Pac. 752, *denying rehearing in* 4 Okla. Crim. 489, 112 Pac. 35; *Crawford v. Ferguson*, 5 Okla. Crim. 377, 115 Pac. 278.

<sup>3</sup> *Sharswood's Ethics*, p. 75.

<sup>4</sup> *Baker v. State*, 90 Ga. 153, 15 S. E. 788. And see to the same effect *State v. Martin*, 45 Wash. 76, 87 Pac. 1054. See also *In re Stephens*, 84 Cal. 77, 24 Pac. 46; *Finley v. Acme Kitchen Furniture Co.*, 119 Tenn. 698, 109 S. W. 504.

crime; nor does the question of privilege arise, as the only question to be determined is the fitness of the respondent to practice law.<sup>5</sup> It has been held, however, that the court will not disbar an attorney for the insertion of scandalous matter, in a petition, as to the moral character of another attorney, where there is an adequate remedy by contempt proceedings.<sup>6</sup>

**§ 794. Improper Conduct.** — An attorney who approached counsel for the other side of a case, and fraudulently pretended to have knowledge of certain facts which he offered to sell for the purpose of inducing an offer of settlement, which otherwise would not have been made, was disbarred.<sup>7</sup> And statements to the effect that a prosecuting officer was selling the power of his office, and that he had no right to the office, and was disqualified because of being attorney for the prosecuting witness, may, at least in connection with evidence of other misconduct, warrant disbarment.<sup>8</sup> It has also been held to be ground for disbarment where an attorney charged a judge with favoritism toward a particular attorney of his court.<sup>9</sup> And an attempt, on the part of an attorney, to make opposing counsel drunk, in order that he might obtain an advantage in the trial of a cause, is a good ground for striking the offender's name from the roll of attorneys. The court said, in speaking of this case: "This was a wicked act, as well as one which struck directly at the due administration of justice. In its effect and criminal purpose it differs none from tampering with a juror, corrupting a witness or bribing a judge. It strikes directly at the interests of the opposite party, with as great force as if he lost his cause from the misconduct of juror, witness or judge. The man who can do this thing is unfit to practice in a court where justice is administered, and should be expelled from its bar; or at least should be suspended from the practice until he has shown by sincere amendment, that his offense is thoroughly

<sup>5</sup> *In re Adriaans*, 17 App. Cas. (D. C.) 39.

<sup>6</sup> *People v. Berry*, 17 Colo. 322, 29 Pac. 904, *distinguishing* *People v. Green*, 9 Colo. 506, 13 Pac. 514.

<sup>7</sup> *In re Enright*, 67 Vt. 351, 31 Atl. 786.

<sup>8</sup> *In re Adriaans*, 17 App. Cas. (D. C.) 39.

<sup>9</sup> *Matter of Rockmore*, 127 App. Div. 499, 111 N. Y. S. 879.



purged.”<sup>10</sup> So, it has been held that the institution of proceedings for the disbarment of a brother attorney, from improper motives and without just ground, is misconduct for which an attorney is at least censurable.<sup>11</sup> But where an attorney represented to opposing counsel that he had no defense, and promised to pay a sum for which his client was sued within a certain time, because of which promise delay was granted, and, through the attorney’s misconduct, such sum was not paid, but the adverse party was obliged to collect his claim by execution, it was held that such conduct, while deserving of condemnation, did not warrant disbarment.<sup>12</sup>

*Misconduct toward Client.*

**§ 795. Generally.** — In dealing with his client, an attorney must act with entire good faith, and take no undue advantage of him;<sup>13</sup> and the failure to so conduct himself may constitute a sufficient ground for his disbarment, providing, of course, that his indiscretions show him to be unfitted for his office.<sup>14</sup> Thus, an attorney may be disbarred for the failure to apply money received from his client as directed, especially where the client is injured thereby.<sup>15</sup> So, disbarment may be predicated on the fact that an attorney failed to render services agreed upon, and refused to return the compensation received by him therefor, in pursuance of an agreement so to do.<sup>16</sup> Nor should an attorney, without his client’s consent, substitute himself for another as his client’s debtor.<sup>17</sup> And an attorney for an administrator, who borrows from his client money belonging to the estate and deposits the

<sup>10</sup> Dickens’s Case, 67 Pa. St. 169, 5 Am. Rep. 420.

<sup>11</sup> In re Kelly, 62 N. Y. 198. See also In re Cooksey, 79 Kan. 550, 100 Pac. 62.

<sup>12</sup> In re Cohn, 150 App. Div. 470, 134 N. Y. S. 1103.

<sup>13</sup> See *supra*, §§ 152-182.

<sup>14</sup> Wernimont v. State, 101 Ark. 210, Ann. Cas. 1913D 1156. 142 S. W. 194; State v. Rohrig, (Ia.) 139 N. W.

908; State v. Richardson, 122 La. 1064, 48 So. 458.

<sup>15</sup> In re Stern, 120 App. Div. 375, 105 N. Y. S. 199.

<sup>16</sup> In re McDermit, 63 N. J. L. 476, 43 Atl. 685; In re O’Sullivan, 122 App. Div. 527, 107 N. Y. S. 462. See also Matter of Mahoe, 3 Hawaii 255; In re Voxman, 148 App. Div. 286, 132 N. Y. S. 217; In re Elliott, 18 S. D. 264, 100 N. W. 431.

<sup>17</sup> In re Aldrich. (Vt.) 86 Atl. 801.

same in a bank to his own credit, and it is there applied to his use, is guilty of misconduct which will warrant his suspension from practice.<sup>18</sup>

§ 796. **Fraud and Deceit.**—The perpetration of a fraud or deceit upon a client by his attorney constitutes a sufficient ground for disbarment, and in several jurisdictions it is so provided by statute.<sup>19</sup> Thus, disbarment may be ordered where an attorney corruptly consents to the entry of judgment against his client,<sup>20</sup> or unlawfully procures the entry of such a judgment,<sup>1</sup> or where he institutes a criminal proceeding for the purpose of extorting money from his client,<sup>2</sup> or where he receives money in his official capacity and converts the same to his own use for the purpose of frustrating the object of the person paying it,<sup>3</sup> or where he deceives his client by means of forgeries,<sup>4</sup> or procures from the client the execution of instruments containing clauses that the client supposed had been erased.<sup>5</sup> So, an attorney may be disbarred where he falsely advises a client that she is entitled to contest a will as next of kin, when he knows that the client has no such right;<sup>6</sup> and also where he verifies and files objections to the probate of a will contrary to the directions of his client,<sup>7</sup> or where

<sup>18</sup> In re Freedman, 113 App. Div. 327, 99 N. Y. S. 135. See also In re Burris, 101 Cal. 624, 36 Pac. 101.

<sup>19</sup> *Arkansas*.—Wernimont v. State, 101 Ark. 210, Ann. Cas. 1913D 1156, 142 S. W. 194.

*Colorado*.—People v. Sindlinger, 28 Colo. 258, 64 Pac. 191.

*Georgia*.—Jones v. McCullough, 138 Ga. 16, 74 S. E. 694.

*Iowa*.—Slemmer v. Wright, 54 Ia. 164, 6 N. W. 181.

*New York*.—In re Clark, 184 N. Y. 222, 77 N. E. 1, *affirming* 108 App. Div. 150, 95 N. Y. S. 388; In re Gluck, 139 App. Div. 894, 123 N. Y. S. 857.

And see also *supra*, § 156.

<sup>20</sup> Counsel guilty of deceit or collusion are punishable by the statute Westm. 1, 3 Edw. 1, c. 28, with im-

prisonment for a year and a day, and perpetual silence in the courts." 3 Bl. Com. 29.

<sup>20</sup> People v. Lamborn, 2 Ill. 123.

<sup>1</sup> In re Wartman, (N. J.) 31 Atl. 1040.

<sup>2</sup> People v. Frisch, 218 Ill. 275, 75 N. E. 904.

<sup>3</sup> In re Orwig, 31 Leg. Int. (Pa.) 20.

<sup>4</sup> Ex p. Kindt, 32 Ore. 474, 52 Pac. 187.

<sup>5</sup> In re Gluck, 139 App. Div. 894, 123 N. Y. S. 857.

<sup>6</sup> In re Randall, 122 App. Div. 1, 106 N. Y. 943, *affirmed* 196 N. Y. 569, 90 N. E. 1165.

<sup>7</sup> In re Randall, 122 App. Div. 1, 106 N. Y. S. 943, *affirmed* 196 N. Y. 569, 90 N. E. 1165.

he deceives a client as to services rendered,<sup>8</sup> fees due,<sup>9</sup> or disbursements made;<sup>10</sup> or where he conceals from the client the fact that he has settled the litigation,<sup>11</sup> or deceives his client by assurances that a case is on the calendar and is being diligently prosecuted, when, in fact, the case has not been noticed for trial.<sup>12</sup>

**§ 797. False Representations.**—An attorney who obtains the money or other property of his client by means of false representations should be disbarred.<sup>13</sup> It has been so held where money was obtained on the strength of false representations as to the validity of security therefor,<sup>14</sup> and also as to false representations as to the client's liability under a certain judgment.<sup>15</sup> So, an attorney may be disbarred where he obtains money from his client by falsely representing that certain legal proceedings are pending, and that the money is required therefor,<sup>16</sup> or that the money is needed to pay costs,<sup>17</sup> or to bribe a referee in bankruptcy.<sup>18</sup> And where an attorney obtained money from his client on a statement to the effect that it was necessary for the protection of her interests that such money should be deposited, and, instead of making

<sup>8</sup> *In re Ryan*, 143 N. Y. 528, 38 N. E. 963. And see *In re Gluck*, 139 App. Div. 894, 123 N. Y. S. 857.

<sup>9</sup> *Tate v. Field*, 60 N. J. Eq. 42, 46 Atl. 952.

<sup>10</sup> *In re Radford*, 168 Mich. 474, 134 N. W. 472.

<sup>11</sup> *In re Simpson*, 9 N. D. 379, 83 N. W. 541.

<sup>12</sup> *In re Boehm*, 150 App. Div. 443, 135 N. Y. S. 42.

<sup>13</sup> *United States*.—*In re Snyder*, 24 Fed. 910.

*California*.—*In re Burris*, 101 Cal. 624, 36 Pac. 101.

*Colorado*.—*People v. Sindlinger*, 28 Colo. 258, 64 Pac. 191.

*Hawaii*.—*Matter of Mahoe*, 3 Hawaii 255.

*Illinois*.—*People v. Ford*, 54 Ill. 520; *People v. Frisch*, 218 Ill. 275, 75 N. E. 904.

*Minnesota*.—*In re Novotny*, 142 N. W. 733.

*New York*.—*In re Andrews*, 137 App. Div. 353, 121 N. Y. S. 935.

*South Dakota*.—*In re Elliott*, 18 S. D. 264, 100 N. W. 431.

And see also *supra*, §§ 157, 158.

<sup>14</sup> *State v. Cadwell*, 16 Mont. 119, 40 Pac. 176; *In re Young*, 75 N. J. L. 83, 67 Atl. 717; *In re Logan*, 143 App. Div. 225, 128 N. Y. S. 134.

<sup>15</sup> *Fairfield County Bar v. Taylor*, 60 Conn. 11, 22 Atl. 441, 13 L.R.A. 767.

<sup>16</sup> *People v. Mead*, 29 Colo. 344, 68 Pac. 241; *People v. Belinski*, 205 Ill. 564, 69 N. E. 5; *In re Simpson*, (N. J.) 82 Atl. 507.

<sup>17</sup> *In re Elliott*, 718 S. D. 264, 100 N. W. 431.

<sup>18</sup> *State v. Grover*, 47 Wash. 39, 91 Pac. 564.

such deposit, appropriated said money to his own use without his client's knowledge or consent, it was held that his misconduct warranted disbarment.<sup>19</sup> So, an attorney who obtains money because of a false representation that he was authorized to practice in the federal courts, may be disbarred.<sup>20</sup> Disbarment may also result from false statements as to the amount of money which an attorney has collected for his client,<sup>1</sup> or as to the character of other attorneys,<sup>2</sup> or for the purpose of carrying on a fraud previously perpetrated,<sup>3</sup> as, for instance, as to the disposition of the client's money.<sup>4</sup> It is equally reprehensible to procure third persons to make false statements to the client, and upon the strength thereof to induce the client to advance money, or enter into litigation.<sup>5</sup>

**§ 798. Representing Conflicting Interests.** — Attorneys cannot represent conflicting interests,<sup>6</sup> or take money from both sides;<sup>7</sup> and if this plain duty is disregarded, to a client's prejudice, disbarment may follow.<sup>8</sup> An attorney who, after having been employed by one party, seeks employment by the adverse party, offering to impart to the latter important information, is guilty of such a breach of trust as requires his disbarment.<sup>9</sup> And where an attorney, employed and paid by a defendant who has been sued for damages, has himself substituted as attorney for the plaintiff, and in that capacity attempts to effect a settlement which the plaintiff

<sup>19</sup> *Matter of Cohen*, 120 App. Div. 378, 105 N. Y. S. 84; *In re Shamroth*, 148 App. Div. 828, 133 N. Y. S. 514. See also *In re Burris*, 101 Cal. 624, 36 Pac. 101.

<sup>20</sup> *In re Danford*, 157 Cal. 425, 108 Pac. 322.

<sup>1</sup> *Slemmer v. Wright*, 54 Ia. 164, 6 N. W. 181; *In re Weed*, 26 Mont. 507, 68 Pac. 1115.

<sup>2</sup> See *supra*, § 794. And see also *In re Stephens*, 84 Cal. 77, 24 Pac. 46.

<sup>3</sup> *In re Voxman*, 148 App. Div. 286, 132 N. Y. S. 217.

<sup>4</sup> *Matter of Wright*, 12 C. B. N. S. 705, 104 E. C. L. 705. See also *People v. Betts*, 26 Colo. 521, 58 Pac. 1091.

<sup>5</sup> *In re Durant*, 80 Conn. 140, 10 Ann. Cas. 539, 67 Atl. 497.

<sup>6</sup> See *supra*, §§ 174-182.

<sup>7</sup> *People v. Keithley*, 225 Ill. 30, 80 N. E. 50; *In re Bowman*, 7 Mo. App. 569.

<sup>8</sup> *In re Cowdery*, 69 Cal. 32, 10 Pac. 47, 58 Am. Rep. 545; *In re Whittemore*, 69 Cal. 67, 10 Pac. 68; *Cowley v. O'Connell*, 174 Mass. 253, 53 N. E. 1001, 54 N. E. 558; *In re Gadsden*, 89 S. C. 352, 71 S. E. 952; *In re O——*, 73 Wis. 602, 42 N. W. 221.

<sup>9</sup> *U. S. v. Costen*, 38 Fed. 24; *In re Boone*, 83 Fed. 944.

was willing to make prior to the substitution, he is guilty of misconduct, and will be at least censured.<sup>10</sup> So, an attorney may be disbarred where he urges a criminal prosecution against a certain person and assists therein, and thereafter appears for the defense;<sup>11</sup> or where, while acting as attorney for the prosecutor in a criminal case, he accepts money from the defendant in consideration of a dismissal.<sup>12</sup> And it has been held that a prosecuting attorney violates his duty by appearing for the defendant in an indictment found during his term of office.<sup>13</sup> So, the conduct of a city attorney who, after his term of office, accepted a retainer to refrain from appearing against the city in any suit then pending, and who subsequently appeared in such a suit, was held to justify his suspension, even though he had no knowledge of the law or the facts of the suit undertaken by him at the time he accepted the retainer from the city.<sup>14</sup> But the acceptance of a retainer from persons whose interests are adverse to those of the client, under a mistake of fact, will not justify disbarment,<sup>15</sup> nor is an attorney guilty of unprofessional conduct for failing to disclose to his client all of his connection with antagonistic interests, especially where the client has been informed of the essentials, and the attorney has reason to believe that the client is familiar with the facts.<sup>16</sup>

**§ 799. Acquiring Adverse Interests.**— Counsel should not acquire interests adverse to those of their clients, and this is particularly true as to the acquisition of an interest in the subject-matter of litigation which an attorney is employed to conduct.<sup>17</sup>

<sup>10</sup> *In re Reifschneider*, 60 App. Div. 478, 69 N. Y. S. 1069.

<sup>11</sup> *People v. Spencer*, 61 Cal. 128; *In re Stephens*, 77 Cal. 357, 19 Pac. 646.

<sup>12</sup> *Tudor v. Com.*, 84 S. W. 522, 27 Ky. L. Rep. 87.

<sup>13</sup> *People v. Spencer*, 61 Cal. 128.

*Compare* *People v. Johnson*, 40 Colo. 460, 90 Pac. 1038, wherein it appeared that a district attorney represented the defendant in a criminal case wherein, as prosecutor, he had

filed the information, and it was held that, in the absence of proof of the use of knowledge secured while acting as prosecuting attorney, there was no cause for disbarment.

<sup>14</sup> *In re Cowdery*, 69 Cal. 32, 10 Pac. 47, 58 Am. Rep. 545.

<sup>15</sup> *In re Luce*, 83 Cal. 303, 23 Pac. 350.

<sup>16</sup> *Davis v. Chattanooga Union R. Co.*, 65 Fed. 359.

<sup>17</sup> See *supra*, §§ 164-173.

In a case where disbarment was ordered because of a violation of this rule, it was said: "The main fact which stands out in this whole investigation is that it never seems to have occurred to the respondent that there was any impropriety in his acquiring from his clients their property that he was employed to preserve and protect, or that the respondent was under any obligations to his clients, when he wished to purchase their property, to state that he was himself interested in the purchase, and that it was made on his behalf. He took the titles in the name of his dummies without disclosing the fact that the dummies represented him or that the dummies were his clerks or associates, and then continued to conduct the proceeding for the valuation of his property in the name of his clients, suppressing from the commissioners and the experts who valued the property the fact of the purchase and all facts within his knowledge that would affect the value of the property."<sup>18</sup> So, where an attorney procures an assignment of his client's property to the client's prejudice, whether such property be the subject-matter of litigation or not, his conduct may constitute a sufficient ground for disbarment.<sup>19</sup> Nor can an attorney acquire his client's property at a judicial sale to his client's detriment;<sup>20</sup> and where an attorney does so acquire property, under circumstances showing that an undue advantage has been taken of the client, the attorney will be disbarred.<sup>1</sup> Of course, where property is acquired by an attorney, even though it is the subject-matter of litigation, in a fair and honorable manner, and without false representation, undue advantage, fraud or deceit, no ground for disbarment exists because of the transaction.<sup>2</sup>

**§ 800. Undue Advantage.** — It is highly unprofessional for an attorney to procure either the money or property of his client by taking an undue advantage of him,<sup>3</sup> and such conduct may constitute a sufficient ground for disbarment. Thus, an attorney for

<sup>18</sup> *In re Flannery*, 150 App. Div. 369, 135 N. Y. S. 612.

<sup>19</sup> *In re Ramsey*, 24 S. D. 266, 123 N. W. 726. See also *Matter of V.*, 10 App. Div. 491, 42 N. Y. S. 268. And see *supra*, §§ 157, 158, 796.

<sup>20</sup> See *supra*, § 166.

<sup>1</sup> *People v. Murphy*, 119 Ill. 159, 6 N. E. 488.

<sup>2</sup> See *supra*, § 154. See also *Gelders v. Haygood*, 182 Fed. 109; *In re Reese's Estate*, 41 Pa. Super. Ct. 72.

<sup>3</sup> See *supra*, §§ 152-162.

an administrator, who induces a distributee of the estate to execute a release of her share, such distributee being quite old and unfamiliar with business affairs, may be disbarred if a fraudulent motive, or want of integrity, be sufficiently shown.<sup>4</sup> It is also ground for disbarment for an attorney to procure conveyances, of practically all her property, from a mentally incompetent client.<sup>5</sup> And where a weak-minded person fled to another state believing that he was guilty of a certain crime, an attorney who represented him, and who knew that he was innocent, will be disbarred where he fraudulently procured large sums of money from his client on the pretext of saving him from arrest and conviction.<sup>6</sup> But an attorney's acceptance of a retainer from a client to investigate his rights is not improper, even though he knows that his client is of unsound mind, or later discovers that fact; to hold otherwise would deprive an insane person of the aid and assistance of counsel;<sup>7</sup> contracts of this character, however, must be fair and reasonable.<sup>8</sup>

### § 801. Misconduct in Connection with Settlements.—

It has been held that disbarment may be ordered where an attorney settles litigation and conceals that fact from his client,<sup>9</sup> or where he takes an undue advantage of his client with respect to the making of a settlement;<sup>10</sup> so, where suits were settled by the parties themselves and counsel paid for their services, it was held to be misconduct, which justified suspension, for the plaintiff's attorney to proceed to collect costs from the defendant by taking a default judgment and issuing execution, before he ascertained whether the settlement had provided for the payment of such costs.<sup>11</sup> But it is not unprofessional conduct for an attorney to instruct his client not to settle privately.<sup>12</sup> Nor is it misconduct for an attorney to settle a claim, as he was authorized to do, without

<sup>4</sup> *In re Gadsden*, 89 S. C. 352, 71 S. E. 952.

<sup>5</sup> *In re Egan*, 22 S. D. 355, 117 N. W. 874, *reviewed and reaffirmed* 24 S. D. 301, 123 N. W. 478.

<sup>6</sup> *In re Snyder*, 24 Fed. 910.

<sup>7</sup> *People v. Adams*, 249 Ill. 524, 94 N. E. 950.

<sup>8</sup> See *supra*, §§ 418, 428-432.

<sup>9</sup> *In re Simpson*, 9 N. D. 379, 83 N. W. 541.

<sup>10</sup> *Matter of V.*, 10 App. Div. 491, 42 N. Y. S. 268.

<sup>11</sup> *In re Aldrich*, (Vt.) 86 Atl. 801.

<sup>12</sup> *Grievance Committee v. Emis*, 84 Conn. 594, 80 Atl. 767.

first reporting the offer of settlement to his client.<sup>13</sup> And an attorney who contracted to prosecute a claim for the personal injury of a minor for one half the recovery, will not be disbarred, at least in the absence of a showing of corrupt motive, because he charged that sum on the settlement of the litigation.<sup>14</sup> So, where an attorney received a sum of money for the settlement of a charge of petit larceny, and he settled for a lesser sum, and retained the balance for his fees, the amount retained not being excessive, it was held that, although his conduct was censurable, it did not constitute ground for disbarment.<sup>15</sup> Nor will an attorney be disbarred because, in making a settlement, he conceals the weakness of his client's case.<sup>16</sup>

**§ 802. Overcharging Client.**—In the absence of a special contract, an attorney is only entitled to reasonable compensation for his services;<sup>17</sup> and while the amount of compensation may be regulated by contract,<sup>18</sup> it is essential that such contract be fairly and honestly entered into, and that the attorney should disclose any information which may be necessary for the guidance of the client in the premises; unconscionable contracts will not be upheld.<sup>19</sup> An exorbitant or fictitious charge, especially where it is accompanied by other acts of unprofessional conduct, will constitute a sufficient ground for disbarment;<sup>20</sup> and where a bill ren-

<sup>13</sup> *Grievance Committee v. Emis*, 84 Conn. 594, 80 Atl. 767.

<sup>14</sup> *Grievance Committee v. Emis*, 84 Conn. 594, 80 Atl. 767.

<sup>15</sup> *In re Woytisek*, 120 App. Div. 373, 105 N. Y. S. 144.

<sup>16</sup> *Grievance Committee v. Emis*, 84 Conn. 594, 80 Atl. 767.

<sup>17</sup> See *supra*, §§ 447-449. See also *State v. Rohrig*, (Ia.) 139 N. W. 908.

<sup>18</sup> See *supra*, §§ 417-427.

<sup>19</sup> See *supra*, §§ 428-432.

<sup>20</sup> *Colorado*.—*People v. Varnum*, 28 Colo. 349, 64 Pac. 202.

*Georgia*.—*Baker v. State*, 90 Ga. 153, 15 S. E. 788.

*Illinois*.—*People v. Stirten*, 224 Ill. 636, 79 N. E. 969.

*Montana*.—See *In re Weed*, 26 Mont. 507, 68 Pac. 1115.

*New York*.—*In re ———*, 86 N. Y. 563; *In re Ryan*, 143 N. Y. 528, 38 N. E. 963.

*North Dakota*.—*In re Simpson*, 9 N. D. 379, 83 N. W. 541.

*Ohio*.—See *In re Thatcher*, 83 Ohio St. 246, Ann. Cas. 1912A 810, 93 N. E. 895.

*Pennsylvania*.—*Appeal of Maires*, 189 Pa. St. 99, 41 Atl. 988, 43 W. N. C. 311.

*Wisconsin*.—See *In re O——*, 73 Wis. 602, 42 N. W. 221.



dered by an attorney for prosecuting a suit for his client is not only fraudulently untrue as to items for services not rendered, but inflated throughout by charges beyond what the services were worth, and shows a fraudulent intent, the court may proceed summarily against him.<sup>1</sup> But it is not unprofessional to retain compensation due out of a sum collected for a client,<sup>2</sup> nor can an attorney be disbarred merely because of an apparently excessive charge.<sup>3</sup> It would seem that the proper practice in cases of this character would be to proceed by suit,<sup>4</sup> or summary proceeding,<sup>5</sup> for the recovery of the sum withheld; and, should the client prevail, disbarment might follow, especially if the attorney refused to pay the sum found to be due.<sup>6</sup>

**§ 803. Changed View of the Law.**—Of course, an attorney should not accept a retainer in a case when he believes that his client cannot succeed. But the fact that an attorney has, under a prior retainer, advocated views of the law and facts different from those upon which his client rests his case, or has officially, as a judge or officer of the government, held a different view of the law and the rights of the parties, will not of itself disqualify him from accepting a retainer. He has the right and privilege, possessed by all men, to change his views upon the law and the facts of a case when reason requires it. It would be absurd to say that a lawyer or judge, having once expressed an opinion upon legal questions, shall never change it, or that a judicial or official decision will forever bind the person announcing it. From the nature of legal questions, which depend upon a combination of facts for their correct decision, it is to be expected that lawyers will not always, in their solution, apply the same principles or reasoning.<sup>7</sup> Thus, it has been held that an attorney will not be disbarred merely because, at one time, he expressed an opinion that a certain deed

<sup>1</sup> *Tate v. Field*, 60 N. J. Eq. 42, 46 Atl. 952. See also *In re Radford*, 168 Mich. 474, 134 N. W. 472.

<sup>2</sup> See *supra*, § 476. See also *In re Aldrich*, (Vt.) 86 Atl. 801.

<sup>3</sup> *In re Luce*, 83 Cal. 303, 23 Pac. 359; *People v. Robinson*, 32 Colo. 241, 75 Pac. 922; *Grievance Committee v.*

*Ennis*, 84 Conn. 594, 80 Atl. 767; *In re Aldrich*, (Vt.) 86 Atl. 801.

<sup>4</sup> See *supra*, §§ 344-353.

<sup>5</sup> See *supra*, §§ 354-364.

<sup>6</sup> See *infra*, §§ 804-815.

<sup>7</sup> *Smith v. C. & N. W. R. Co.*, 60 Ia. 515, 15 N. W. 291.

was valid, and that he afterwards brought suit against the grantee to recover the land because of defects, not involving such deed, in the title.<sup>8</sup>

*Misappropriation of Client's Funds.*

§ 804. **General Rule.** — It is the duty of an attorney to pay over such funds of the client as may come into his hands,<sup>9</sup> less his fees;<sup>10</sup> and should he fail to do so, or convert the same to his own use, or otherwise misappropriate such funds, he may be disbarred.<sup>11</sup>

<sup>8</sup> *Gelders v. Haygood*, 182 Fed. 109.

<sup>9</sup> See *supra*, § 328.

<sup>10</sup> See *supra*, § 476.

<sup>11</sup> *United States*.—*Jeffries v. Laurie*, 27 Fed. 195.

*California*.—In re *Treadwell*, 67 Cal. 353, 7 Pac. 724; In re *Tyler*, 71 Cal. 353, 12 Pac. 289, 13 Pac. 169.

*Colorado*.—*People v. Ryalls*, 8 Colo. 332, 7 Pac. 290; *People v. Selig*, 25 Colo. 505, 55 Pac. 722; *People v. Walkey*, 26 Colo. 483, 58 Pac. 591; *People v. Hays*, 28 Colo. 82, 62 Pac. 832; *People v. Waldron*, 28 Colo. 249, 64 Pac. 186; *People v. Keegan*, 30 Colo. 71, 69 Pac. 524; *People v. Nicholas*, 36 Colo. 42, 84 Pac. 67.

*Delaware*.—In re *Hoffecker*, 60 Atl. 981.

*Georgia*.—See *Baker v. State*, 90 Ga. 154, 15 S. E. 788.

*Illinois*.—*People v. Palmer*, 61 Ill. 255; *People v. Cole*, 84 Ill. 327; *People v. Salomon*, 184 Ill. 490, 56 N. E. 815; *People v. Pattison*, 241 Ill. 89, 89 N. E. 254; *People v. Allen*, 244 Ill. 393, 91 N. E. 463.

*Indiana*.—*Reilly v. Cavanaugh*, 32 Ind. 214.

*Iowa*.—*Stemmer v. Wright*, 54 Ia. 164, 6 N. W. 181; *State v. Rohrig*, 139 N. W. 908.

*Kansas*.—In re *Wilson*, 79 Kan.

674, 17 Ann. Cas. 690, 100 Pac. 635, 21 L.R.A. (N.S.) 517.

*Kentucky*.—*Wilson v. Popham*, 91 Ky. 327, 15 S. W. 859; *Com. v. Roe*, 129 Ky. 650, 112 S. W. 683, 19 L.R.A. (N.S.) 413.

*Massachusetts*.—*Boston Bar Assoc. v. Casey*, 196 Mass. 100, 81 N. E. 892.

*Minnesota*.—In re *Temple*, 33 Minn. 343, 23 N. W. 463; *Southworth v. Bearnese*, 88 Minn. 31, 92 N. W. 466; In re *Novotny*, 142 N. W. 733.

*Montana*.—*State v. Baum*, 14 Mont. 12, 35 Pac. 108; In re *Thresher*, 33 Mont. 441, 8 Ann. Cas. 845, 84 Pac. 876, 114 Am. St. Rep. 824.

*New Hampshire*.—In re *Allen*, 75 N. H. 301, 73 Atl. 804.

*New Jersey*.—In re *McDermitt*, 63 N. J. L. 476, 43 Atl. 685; In re *Young*, 75 N. J. L. 83, 67 Atl. 717; In re *Bedle*, 87 Atl. 100.

*New York*.—In re *Bleakley*, 5 Paige 311; In re *Titus*, 66 Hun 632 mem., 21 N. Y. S. 724; In re *Stern*, 120 App. Div. 375, 105 N. Y. S. 199; In re *Cohn*, 120 App. Div. 378, 105 N. Y. S. 84; *New York Bar Assoc. v. ChapPELL*, 131 App. Div. 69, 115 N. Y. S. 868; In re *Roseuthal*, 137 App. Div. 772, 122 N. Y. S. 471; In re *Feuchtwanger*, 139 App. Div. 36, 123 N. Y. S. 798; In re *Rockmore*, 139 App.

It is the fact of the wrongful retention or misappropriation of the client's funds, and not the amount thereof, which works the disbarment;<sup>12</sup> and it has been held that there is no presumption of innocence on the part of the attorney, and that unless he fairly and in detail explains the transaction wherein a retention or misappropriation of funds is charged, it will be presumed that he is unable to do so.<sup>13</sup> Misconduct of the character under consideration may, of course, be joined with other misconduct as a ground for disbarment.<sup>14</sup>

**§ 805. Application of Rule.**—Thus, in accordance with the principles stated in the preceding section, an attorney may be disbarred where he disobeys an order of court which requires him to pay over money withheld from his client.<sup>15</sup> So, disbarment may result where an attorney withdraws money of his client which is deposited in court and appropriates the same to his own use,<sup>16</sup> or where he wrongfully retains his client's money by means of false representations,<sup>17</sup> or fraud or deceit.<sup>18</sup> It is equally reprehensible

Div. 71, 123 N. Y. S. 928; *In re Ironside*, 143 App. Div. 921, 128 N. Y. S. 125; *In re Steckler*, 146 App. Div. 827, 131 N. Y. S. 766; *In re Schwarzkopf*, 146 App. Div. 930, 131 N. Y. S. 385; *In re Smith*, 148 App. Div. 291, 132 N. Y. S. 304; *In re Buehler*, 155 App. Div. 246, 140 N. Y. S. 324.

*North Dakota*.—*In re Simpson*, 9 N. D. 379, 83 N. W. 541.

*Ohio*.—*State v. Hand*, 9 Ohio 42.

*Pennsylvania*.—See *Ashton Disbarment*, 4 Pa. Dist. Ct. 425.

*South Carolina*.—*In re Evans*, 94 S. C. 414, 78 S. E. 227.

*Tennessee*.—*State v. Davis*, 92 Tenn. 634, 23 S. W. 59.

*Wisconsin*.—*In re O——*, 73 Wis. 602, 42 N. W. 221.

*Canada*.—*Hinds v. Upper Canada Law Soc.*, 16 Ont. 625, *affirmed* 17 Ont. App. 41; *In re Forbes*, 2 N. W. Ter. 410.

<sup>12</sup> *In re Sayer*, 146 App. Div. 928, 131 N. Y. S. 381. See also *Matter of Stern*, 120 App. Div. 375, 105 N. Y. S. 199.

<sup>13</sup> *People v. Webster*, 28 Colo. 223, 64 Pac. 207.

<sup>14</sup> *Matter of Titus*, 66 Hun 632 mem., 21 N. Y. S. 724. See also the following section.

<sup>15</sup> *Jeffries v. Laurie*, 23 Fed. 786; *In re Burris*, 101 Cal. 624, 36 Pac. 101; *People v. Salomon*, 184 Ill. 490, 56 N. E. 815. See also *supra*, § 804.

<sup>16</sup> *In re Thresher*, 33 Mont. 441, 8 Ann. Cas. 845, 84 Pac. 876, 114 Am. St. Rep. 834.

<sup>17</sup> *Matter of Wilson*, 79 Kan. 674, 17 Ann. Cas. 690, 100 Pac. 635, 21 L.R.A. (N.S.) 517. See also *supra*, § 797.

<sup>18</sup> *In re Tyler*, 71 Cal. 353, 12 Pac. 289, 13 Pac. 169. See also *supra*, § 796.

*Fault of Attorney's Clerk*.—While

for an attorney to appropriate to his own use money given to him for the purpose of instituting litigation,<sup>19</sup> or for any other specific purpose.<sup>20</sup> Disbarment may also result where an attorney negotiates notes of his client which were left with him for safe keeping, or converts his client's bond,<sup>1</sup> or obtains money by means of forgery<sup>2</sup> or embezzlement.<sup>3</sup> Nor will a misappropriation of a client's funds be any the less unprofessional because the attorney was authorized to indorse, in the name of his client, a check received therefor.<sup>4</sup> So, an attorney may be disbarred where, without his client's knowledge, he lends the client's funds to a third person for his own benefit,<sup>5</sup> or uses his client's credit for the benefit of others.<sup>6</sup> It will be understood, of course, that the mere misappropriation of the client's funds, or the failure or neglect to pay them over to the client, may, of itself, be a sufficient ground for disbarment, even though unaccompanied by any other misconduct.<sup>7</sup> Failure of an attorney for an estate, notwithstanding frequent demands, to pay to the referee and stenographer on the accounting of the executors

an attorney should not be disbarred on account of the misappropriation of money if the money was taken by his clerk, to whom he had entrusted it, in good faith, to apply to the client's use (In re Rockmore, 130 App. Div. 586, 117 N. Y. S. 512), yet an effort of the attorney, by false testimony, to charge his own embezzlement upon his clerk, is itself an offense which warrants his disbarment (In re Rockmore, 139 App. Div. 71, 123 N. Y. S. 928).

<sup>19</sup> *People v. Hays*, 28 Colo. 82, 62 Pac. 832; In re Bedle, (N. J.) 87 Atl. 100; *Matter of Voxman*, 148 App. Div. 286, 132 N. Y. S. 217.

<sup>20</sup> In re Titus, 66 Hun 632 mem., 21 N. Y. S. 724; *State v. Cadwell*, 16 Mont. 119, 40 Pac. 176. See also In re Temple, 33 Minn. 343, 23 N. W. 463.

<sup>1</sup> In re Davies, 93 Pa. St. 116, 39 Am. Rep. 729.

But where an attorney was given jewelry as a pledge for his fees, and the pledgee foreclosed, it was held that the attorney would not be disbarred merely because, on the payment of the amount due him by the client, he was unable to redeem the pledge. *People v. Humbert*, 51 Colo. 60, 117 Pac. 139.

<sup>2</sup> *People v. Walkey*, 26 Colo. 483, 58 Pac. 591; In re Rosenthal, 137 App. Div. 772, 122 N. Y. S. 471. See also *Kennedy's Disbarment*, 178 Pa. St. 232, 35 Atl. 995.

<sup>3</sup> In re Rosenthal, 137 App. Div. 772, 122 N. Y. S. 471.

<sup>4</sup> In re Evans, 94 S. C. 414, 78 S. E. 227.

<sup>5</sup> In re Simpson, 9 N. D. 379, 83 N. W. 541.

<sup>6</sup> See In re Temple, 33 Minn. 343, 23 N. W. 463.

<sup>7</sup> See the cases cited at the first note of the preceding section.

the amounts allowed them by the decree, and which the executor had given him to pay to them, in the absence of any charge that he actually appropriated the money to his own use, is not, however, such professional misconduct as to require the court to proceed further than to express disapproval of his act.<sup>8</sup>

**§ 806. Misappropriation by Partner.** — While it is well settled that every member of a law firm is individually liable in a civil action for the acts of any of the partners within the scope of their authority as such,<sup>9</sup> nevertheless the fact that one partner has collected and retained, or misappropriated, funds belonging to a client of the firm, will not warrant the disbarment of any of the partners who had no knowledge of such wrongdoing.<sup>10</sup> But where a firm of attorneys falsely informed their client that they had not collected an account placed with them for collection, it is immaterial, in proceedings for their disbarment for withholding such funds, whether the misappropriation was effected by one or both of them, or whether the funds were used for partnership or personal expenses.<sup>11</sup>

**§ 807. In Professional Capacity.** — As a general rule, it is held that if an attorney at law converts, or otherwise misappropriates, money intrusted to him in another capacity, he will be disbarred on the ground that he no longer possesses the qualifications required in members of the bar.<sup>12</sup> Thus, an attorney has been disbarred for the misappropriation of funds received by him as a tax

<sup>8</sup> *In re Henderson*, 146 App. Div. 944, 131 N. Y. S. 544.

<sup>9</sup> See *supra*, § 292.

<sup>10</sup> *In re Luce*, 83 Cal. 303, 23 Pac. 350; *Klingensmith v. Kepler*, 41 Ind. 341; *Kepler v. Klingensmith*, 50 Ind. 434; *Porter v. Vance*, 14 Lea (Tenn.) 629; *Re McCaughey*, 3 Ont. 425; *Re Ross*, 16 Ont. Pr. 482; *Re Harris*, 3 N. W. Ter. 70.

<sup>11</sup> *People v. Betts*, 26 Colo. 521, 58 Pac. 1091.

<sup>12</sup> *Re Hill*, L. R. 3 Q. B. (Eng.)

543, 9 B. & S. 481, 37 L. J. Q. B. 295, 18 L. T. N. S. 564; *Matter of Blake*, 3 El. & El. 40, 107 E. C. L. 40; *In re O'Reilly*, 1 U. C. Q. B. 392, 2 Ont. Pr. 198; *Hands v. Upper Canada Law Soc.*, 16 Ont. 625; *People v. Essington*, 32 Colo. 168, 75 Pac. 394; *Matter of Wilson*, 79 Kan. 674, 17 Ann. Cas. 690, 100 Pac. 635; *New York Bar Assoc. v. Chappell*, 131 App. Div. 69, 115 N. Y. S. 868; *Matter of Alexander*, 137 App. Div. 770, 122 N. Y. S. 479. And see also *infra*, § 840.

collector,<sup>13</sup> or as a trustee,<sup>14</sup> guardian,<sup>15</sup> or bailee.<sup>16</sup> So, where an attorney was taken sick and arranged with another lawyer to act as his substitute for a fixed compensation, it was held that such substitute was acting in his professional capacity in receiving a check payable to the original attorney in settlement of the litigation, and might be disbarred for the forgery thereof and conversion of the proceeds to his own use.<sup>17</sup> But in one case, where it appeared that an attorney accepted a trust as an individual, and not as attorney, and that he mortgaged and sold the trust property and appropriated the proceeds thereof, it was held that, while he deserved censure, he was not liable to disbarment.<sup>18</sup>

§ 808. **Necessity of Demanding Payment.** — The mere fact that an attorney has received money for his client and failed to pay it over, is not, in itself, a sufficient ground for disbarment.<sup>19</sup> It should first appear that the sum alleged to be due has been demanded by the client, and that the attorney failed to pay it over upon such demand, or within a reasonable time thereafter; and, in some states, a demand for payment is required by statute.<sup>20</sup> But it has been held that a demand is unnecessary where an attorney falsely represents to his client that no collection has been made.<sup>1</sup>

<sup>13</sup> *Delano's Case*, 58 N. H. 5, 42 Am. Rep. 555.

<sup>14</sup> *In re Hoffecker*, (Del.) 60 Atl. 981.

<sup>15</sup> *In re Swadener*, 5 Ohio Dec. 598, 2 Ohio Leg. N. 478.

<sup>16</sup> *In re O——*, 73 Wis. 602, 42 N. W. 221.

<sup>17</sup> *In re Lash*, 150 App. Div. 467, 135 N. Y. S. 370.

<sup>18</sup> *People v. Appleton*, 105 Ill. 474, 44 Am. Rep. 812; but see dissenting opinion of Mulkey, J., in the same case.

<sup>19</sup> *Guilford v. Sims*, 13 C. B. 370, 76 E. C. L. 370; *Re Campbell*, 32 U. C. Q. B. 441; *Re J. B., An Attorney*, 6 Manitoba 19; *People v. Brotherson*, 36 Barb. (N. Y.) 662; *In re Veeder*, 11 N. M. 43, 66 Pac. 545.

<sup>20</sup> *Colorado*.—*People v. Keegan*, 30 Colo. 71, 69 Pac. 524.

*Illinois*.—*People v. Palmer*, 61 Ill. 255.

*Kentucky*.—*Wilson v. Popham*, 91 Ky. 327, 15 S. W. 859; *Com. v. Roe*, 129 Ky. 650, 112 S. W. 683, 19 L.R.A. (N.S.) 413.

*Montana*.—*State v. Baum*, 14 Mont. 12, 35 Pac. 108.

*New York*.—*New York Bar Assoc. v. Chappell*, 131 App. Div. 69, 115 N. Y. S. 868.

And see also *supra*, § 346, as to the necessity of making a demand prior to the bringing of a civil suit for the recovery of the sum withheld.

<sup>1</sup> *People v. Keegan*, 30 Colo. 71, 69 Pac. 524.

*Compare* *People v. Robinson*, 32

So, where a client repeatedly calls on her attorney for her money, and he knows the purpose of such calls at the time they are made, there is a sufficient demand, as it is not necessary, unless expressly required by statute, that there should be any formal or written demand.<sup>2</sup>

§ 809. **Recovery of Judgment for Amount Due.** — It is not necessary, as a general rule, to recover judgment against an attorney, for a sum alleged to be wrongfully withheld by him, prior to the institution of disbarment proceedings because of his failure to pay such sum over to his client.<sup>3</sup> But disbarment will not be prevented because such a judgment has been recovered,<sup>4</sup> or because of a pending suit wherein such a recovery is sought;<sup>5</sup> nor can an attorney defend as against a rule to show cause why he should not be suspended for failure to pay over money due his client, by alleging that he has appealed from a judgment rendered against him in an action brought by the client therefor;<sup>6</sup> but it has been held that the taking of an appeal from an order directing an attorney to pay a certain sum of money over to his client, and the giving of a supersedeas bond therefor, will prevent the entry of an order for disbarment pending the appeal.<sup>7</sup> In California, however,

Colo. 241, 75 Pac. 922, wherein it was held that it was not ground for disbarment for an attorney to state to his client that nothing had been collected on a certain claim, where the amount of the collection was the minimum collection charge.

<sup>2</sup> *People v. Keegan*, 30 Colo. 71, 69 Pac. 524.

<sup>3</sup> *State v. Davis*, 92 Tenn. 634, 23 S. W. 59.

<sup>4</sup> *People v. Allen*, 244 Ill. 393, 91 N. E. 463. See also *People v. John*, 212 Ill. 615, 72 N. E. 789.

<sup>5</sup> *Hands v. Upper Canada Law Soc.*, 16 Ont. 625. See also *Ex p. A. B., Attorney*, 4 Jur. (Eng.) 639; *Matter of Wright*, 12 C. B. N. S. 705, 104 E. C. L. 705.

*Compare* *Re Fletcher*, 28 Grant.

Ch. (U. C.) 413, wherein it was held that a client waived his right to a summary application for an order to compel a solicitor to repay moneys or, in the alternative, to be stricken from the rolls, by treating the claim as a debt from the solicitor to himself and thereupon bringing an action and recovering a judgment, thus changing the status of the solicitor from that of attorney to that of judgment debtor; and although on execution but a portion of the debt was recovered, yet the client, having chosen his remedy, could not resort to an application to strike from the rolls.

<sup>6</sup> *McMath v. Manns Bros. Boot, etc., Co.*, (Ky.) 15 S. W. 879.

<sup>7</sup> *Hendrick v. Posey*, 104 Ky. 8, 45

it has been held that an application to disbar a lawyer for appropriating funds collected by him will not be entertained until the truth of the matter has been settled in a criminal prosecution, or in an action to recover the money.<sup>8</sup>

**§ 810. Defenses Generally.** — It has been said that no circumstances in which an attorney may be placed will warrant him in appropriating to his personal use the funds of his client, or justify him in falsely stating that such funds are not in his hands.<sup>9</sup> Thus, where a respondent alleged that the retention of his client's money was caused by alcoholism, and it appeared that during the time in question he occupied the offices of district attorney and county attorney, and was engaged in the general practice of the law, the court refused to consider the excuse given, even as a mitigating circumstance.<sup>10</sup> So, where a respondent set up a plea of insanity, and it further appeared that he was found not guilty, on the ground of insanity, of a criminal charge predicated on the same defalcation, and was committed to a hospital for the insane, from which he was subsequently discharged as cured, an order of disbarment was allowed to stand, the court being of the opinion that the proof of insanity was of a weak and unsatisfactory nature.<sup>11</sup> An attorney is also censurable for failing to pay over to his client such money as may be due him, as soon as he learns that it belongs to the client, and it is immaterial that he did not know to whom the money belonged when he first received it.<sup>12</sup> On the other hand, it has been held that the deposit by an attorney of his

S. W. 525, 46 S. W. 702, 20 Ky. L. Rep. 359.

<sup>8</sup> In re Wyatt, 102 Cal. 264, 36 Pac. 586; In re Lowenthal, (Cal.) 37 Pac. 526.

<sup>9</sup> People v. Betts, 26 Colo. 521, 58 Pac. 1091. See also People v. Selig, 25 Colo. 505, 55 Pac. 722; People v. Pattison, 241 Ill. 89, 89 N. E. 254; In re O——, 73 Wis. 602, 42 N. W. 221.

<sup>10</sup> People v. Webster, 31 Colo. 43, 71 Pac. 1116. But see In re Evans, 94 S. C. 414, 78 S. E. 227, wherein it was

said that an attorney who has misapplied moneys collected, and has otherwise been guilty of misconduct, and his wrongdoing has been caused by habits of intemperance, will be suspended from practice indefinitely, with the privilege of moving, after two years, on satisfactory proof of reformation, for reinstatement.

<sup>11</sup> Kennedy's Disbarment, 178 Pa. St. 232, 35 Atl. 995.

<sup>12</sup> In re Fox, 150 App. Div. 602, 135 N. Y. S. 821.



client's money in his own name, and taking it out for his own use, though able to replace it at any time, is not such fraudulent conduct as to furnish ground for disbarment.<sup>13</sup> Nor will an attorney be disbarred merely because he fails properly to report collections, and to keep adequate books of account, and is careless in the transaction of his business with his client.<sup>14</sup> Where an attorney used a claim given to him for collection as a set-off against his personal indebtedness to the debtor, the fact that the client thereafter treated the attorney as the debtor is no defense.<sup>15</sup> Laches in the institution of the disbarment proceedings is also usually considered as a defense thereto.<sup>16</sup>

**§ 811. Client's Indebtedness to Attorney.**— It has been held that the retention of money by an attorney is not ground for disbarment where the client is indebted to the attorney in an amount equal to, or in excess of, the sum withheld.<sup>17</sup> Nor will an attorney be disbarred because of his having applied money, received by him from his client for the purpose of paying premiums on certain insurance policies, toward the payment of fees due himself.<sup>18</sup> Nor will disbarment be ordered because an attorney owes his client a balance on an account growing out of the professional relations between them, where such balance is the subject of a *bona fide* dispute, and it clearly appears that there has been no fraud or deception.<sup>19</sup> But it is improper for an attorney to retain his client's funds because of an indebtedness owing by the client to a

<sup>13</sup> In re Duncan, 64 S. C. 461, 42 S. E. 433. See also *People v. Humbert*, 51 Colo. 60, 117 Pac. 139.

<sup>14</sup> In re Robertson, 28 S. D. 70, 132 N. W. 684, 36 L.R.A.(N.S.) 442.

<sup>15</sup> In re Aldrich, (Vt.) 86 Atl. 801.

<sup>16</sup> See *infra*, § 880. And see also *People v. Allison*, 68 Ill. 151; *Wilson v. Popham*, 91 Ky. 327, 15 S. W. 859; *In re Lentz*, 65 N. J. L. 134, 46 Atl. 761, 50 L.R.A. 415; *In re Henderson*, 146 App. Div. 944, 131 N. Y. S. 544.

<sup>17</sup> *Com. v. McKay*, 20 S. W. 276, 14

Ky. L. Rep. 407; *In re Thresher*, 29 Mont. 11, 73 Pac. 1109.

<sup>18</sup> *In re Sheehan*, 141 App. Div. 510, 126 N. Y. S. 200.

<sup>19</sup> *People v. Robinson*, 32 Colo. 241, 75 Pac. 922. See also *Hamel v. People*, 97 Ill. App. 527; *Butchers' Union Slaughter-House & Live-Stock Landing Co. v. Crescent City Live Stock Landing & Slaughter-House Co.*, 41 La. Ann. 355, 6 So. 508; *Southworth v. Bearnes*, 88 Minn. 31, 92 N. W. 466.

third person;<sup>20</sup> and it is an aggravation of the original offense for an attorney to claim falsely that his client is indebted to him.<sup>1</sup>

§ 812. **Payment.** — The payment of the amount due with reasonable promptness would, of course, constitute a defense to disbarment proceedings based upon nonpayment, but it is seldom, if ever, that such proceedings will be commenced where payment has been so made. Where a married woman caused disbarment proceedings to be instituted because of her attorney's failure to pay over to her the proceeds of notes placed in the attorney's hands for collection, it was held that disbarment would not be ordered on a showing to the effect that the relator's husband sold and delivered the notes in question to the attorney for an adequate consideration, under circumstances indicating knowledge and consent on the part of the relator.<sup>2</sup> So, where it appeared that an attorney had, in fact, wrongfully appropriated a client's money to his own use, but that such misappropriation was made with no actual intent to defraud, and with the expectation of paying the money over as soon as it was required, and that both the principal and interest were paid, not as soon as required, but before the disbarment proceedings were instituted, and it further appeared that the attorney had since conducted himself with integrity, it was held that the circumstances were not sufficient to warrant disbarment.<sup>3</sup> It is certain, however, that the mere fact that money which was wrongfully withheld or misappropriated has been repaid, does not, of itself, operate so as to preclude disbarment proceedings; and if it is shown, in connection with such wrongful detention or misappropriation, that the attorney acted in bad faith toward his client, or that the wrong was committed or aided by means of false representations, fraud, deceit, or crime, disbarment may be ordered notwithstanding such payment.<sup>4</sup> Thus, where it appeared that a

<sup>20</sup> *In re Washington*, 82 Kan. 829, 169 Pac. 700.

<sup>1</sup> *In re O* —, 73 Wis. 602, 42 N. W. 221.

<sup>2</sup> *People v. Anderson*, 21 Colo. 271, 40 Pac. 568.

<sup>3</sup> *In re Lentz*, 65 N. J. L. 134, 46 Atl. 764, 50 L.R.A. 415. See also

dictum in *People v. Selig*, 25 Colo. 505, 55 Pac. 722.

<sup>4</sup> *People v. Chamberlain*, 242 Ill. 260, 89 N. E. 994; *Matter of Prinstein*, 142 App. Div. 807, 127 N. Y. S. 629; *Matter of Pascal*, 146 App. Div. 836, 131 N. Y. S. 823; *Matter of Smith*, 148 App. Div. 291, 132 N. Y.

respondent's friends restored a sum misappropriated by him, he was, nevertheless, disbarred, and it was said that such payment did not remove the doubt as to his future integrity.<sup>5</sup> So, it has been held that a repayment of the larger part of a sum misappropriated by an attorney, is no defense to a proceeding for his disbarment.<sup>6</sup> Indeed, it is a serious misconduct for an attorney to apply his client's money to his own use, irrespective of how able he may be to repay such sum on demand.<sup>7</sup>

§ 813. **Payment after Institution of Proceedings.**—The payment of money wrongfully retained or misappropriated by an attorney after the commencement of disbarment proceedings, cannot be set up as a defense therein;<sup>8</sup> and this is especially true where the wrongdoing is accompanied by aggravated circumstances, as, for instance, the commission of a crime.<sup>9</sup> Nor can a client, with whom a settlement has been made, withdraw the charges against his attorney, and thereby prevent a hearing in the disbarment proceedings.<sup>10</sup> But where an attorney's failure to pay

S. 304; *Matter of Levine*, 148 App. Div. 296, 132 N. Y. S. 124. See also *In re Radford*, 168 Mich. 474, 134 N. W. 472.

<sup>5</sup> *In re Allen*, 75 N. H. 301, 73 Atl. 804.

<sup>6</sup> *People v. Waldron*, 28 Colo. 249, 64 Pac. 186; *Matter of Shamroth*, 148 App. Div. 828, 133 N. Y. S. 514. See also *In re Swadener*, 5 Ohio Dec. 598.

<sup>7</sup> *In re Sayer*, 146 App. Div. 928, 131 N. Y. S. 381.

<sup>8</sup> *England*.—*In re Hill*, L. R. 3 Q. B. 543.

*Canada*.—*Hands v. Upper Canada Law Soc.*, 16 Ont. 625.

*Colorado*.—*Ex p. Browne*, 2 Colo. 553; *People v. Ryalls*, 8 Colo. 332, 7 Pac. 290; *People v. Selig*, 25 Colo. 505, 55 Pac. 722; *People v. Keegan*, 30 Colo. 71, 69 Pac. 524; *People v. Webster*, 31 Colo. 43, 71 Pac. 1116.

*Illinois*.—*People v. Chamberlin*, 242 Ill. 260, 89 N. E. 994.

*Kentucky*.—*Com. v. Roe*, 129 Ky. 650, 112 S. W. 683, 19 L.R.A.(N.S.) 413.

*Missouri*.—*In re Z*—, 89 Mo. App. 426.

*New York*.—*In re Rockmore*, 130 App. Div. 586, 117 N. Y. S. 512, 139 App. Div. 71, 123 N. Y. S. 928; *In re Cohn*, 141 App. Div. 511, 126 N. Y. S. 218; *In re Steckler*, 146 App. Div. 827, 131 N. Y. S. 766; *In re Fox*, 150 App. Div. 602, 135 N. Y. S. 821.

*Ohio*.—*In re Swadener*, 5 Ohio Dec. 598, 2 Ohio Leg. N. 478.

*Pennsylvania*.—*In re Davies*, 93 Pa. St. 116, 39 Am. Rep. 729.

<sup>9</sup> *In re Davies*, 93 Pa. St. 116, 39 Am. Rep. 729.

<sup>10</sup> *In re Rockmore*, 130 App. Div. 586, 117 N. Y. S. 512, 139 App. Div.

over money collected for his client arose from an exaggerated idea of the value of his services, general business inexperience, and want of appreciation of his responsibility as an attorney, it was held that suspension only would be ordered, subject to reinstatement on proof of having paid to the client the sum due him.<sup>11</sup> So, where an attorney was seventy-one years of age, and was seriously ill during the time an amount due his client remained unpaid, and such payment was made after the commencement of proceedings for disbarment, a severe reprimand was deemed to be a sufficient discipline.<sup>12</sup>

**§ 814. Attachment of Funds.** — The funds of a client may, of course, be attached in an attorney's hands,<sup>13</sup> necessitating their retention. So, where money was paid to an attorney by a husband, for the purpose of being paid over to the wife as alimony, and the attorney deposited the same in a bank in his own name, whereupon it was attached, it was held that, although the respondent should not have deposited the money so received in his own name, nevertheless, disbarment would not be ordered where there was no false representation, fraud or deceit, in connection with the transaction.<sup>14</sup>

**§ 815. Inexperience.** — Inexperience is not, of course, strictly speaking, a defense for the wrongful retention of a client's funds. "Even an inexperienced person, at the time of admission as a member of the legal profession, ought to know it is wrong to appropriate to his own use moneys belonging to others."<sup>15</sup> But it is customary, in cases of the character under consideration, to make allowances for inexperienced practitioners;<sup>16</sup> thus, where a charge of unlawfully retaining the funds of a client is not accom-

71, 123 N. Y. S. 928. See also *In re Martin*, 6 Beav. (Eng.) 340; *Honan v. Montreal Bar*, 30 Can. Sup. Ct. 1.

<sup>11</sup> *Champagne v. Benoit*, (R. I.) 78 Atl. 1009.

<sup>12</sup> *In re Tracy*, 150 App. Div. 913, 135 N. Y. S. 29.

<sup>13</sup> See *supra*, § 301.

<sup>14</sup> *People v. Humbert*, 51 Colo. 60, 117 Pac. 139.

<sup>15</sup> *People v. Waldron*, 28 Colo. 249, 64 Pac. 186. See also *Matter of Cohen*, 120 App. Div. 378, 105 N. Y. S. 84.

<sup>16</sup> *Champagne v. Benoit*, (R. I.) 78 Atl. 1009.

panied by any unusual state of facts, or aggravating circumstances, but is apparently due to insolvency, and there are no charges of other misconduct, a temporary suspension will, as a rule, be deemed a sufficient discipline.<sup>17</sup>

*Perverting or Obstructing Justice.*

§ 816. **Generally.** — It is the duty of the court to condemn such conduct in an attorney as may tend to impair or defeat the due administration of justice, or the usefulness of the bar, and to protect the state and the public from lawyers who abuse their privileges by imposing either upon their clients or upon the court.<sup>18</sup> So, under the accepted code of legal ethics, it is the duty of lawyers to aid the court, in the causes in which they appear, in arriving at a proper determination of the law and the facts; theoretically, at least, it is counsel's first duty to see that the issue is justly decided, however his client may be affected thereby.<sup>19</sup> And if, by any act of commission or omission, an attorney deceives the court, and so obstructs or pollutes the administration of justice, or, by the suppression of truth, obtains a result not warranted by law, he is guilty of malpractice, and unworthy of the privileges which the law confers upon him.<sup>20</sup> Thus, where facts within the knowledge of an attorney for a corporation presents a condition showing that his subordinates are spending money for the purpose of inducing false evidence in courts of justice, it is his duty to do all within his power to discourage such practices, and his failure to do so merits disbarment.<sup>1</sup> And where an attorney has been convicted of obstructing the due administration of justice in violation of a federal statute, he may be disciplined therefor by the state court, notwithstanding a recommendation by the federal judge that clemency be extended.<sup>2</sup>

<sup>17</sup> In re Greenberg, 146 App. Div. 945, 131 N. Y. S. 531; In re Lash, 150 App. Div. 467, 135 N. Y. S. 370; In re Buchler, 155 App. Div. 246, 140 N. Y. S. 324.

<sup>18</sup> In re Flannery, 150 App. Div. 369, 135 N. Y. S. 612.

<sup>19</sup> In re Thatcher, 190 Fed. 969.

<sup>20</sup> Wernimont v. State, 101 Ark. 210,

Ann. Cas. 1913D 1156, 142 S. W. 194; In re Eldridge, 82 N. Y. 161, 37 Am. Rep. 558. (See also mem. in 2 Ky. L. Rep. 75.)

<sup>1</sup> In re Robinson, 151 App. Div. 589, 136 N. Y. S. 548.

<sup>2</sup> In re Robinson, 140 App. Div. 329, 125 N. Y. S. 193.

§ 817. **Abuse of Authority or Legal Process.** — It is misconduct for an attorney to abuse the authority vested in him by virtue of his office, or to exercise such authority so as to bring about an abuse, or to aid in the abuse, of legal process.<sup>3</sup> Thus, an attorney may be disbarred where he directs the sheriff, in the execution of a writ of replevin, to take from the defendant's possession goods not described in the writ.<sup>4</sup> So, the suing out of a writ of replevin to enforce the collection of a debt which has been paid, will constitute ground for disbarment.<sup>5</sup> And an attorney who makes use of criminal procedure to enforce the collection of his client's claims is not only liable in a civil action therefor,<sup>6</sup> but he may be disbarred where the circumstances warrant such action.<sup>7</sup> So, an attorney who resorts to subterfuge for the purpose of securing jurisdiction over nonresidents, so as to compel them to compromise litigation, is guilty of a fraud upon the court for which he may be disbarred.<sup>8</sup> And where an attorney, because he was unable to collect his fees for services rendered in preventing the cancellation of a homestead claim, instigated another contest against his former client based largely on the same facts, and appeared for the contestant therein, and testified against such former client as to privileged communications, he was disbarred.<sup>9</sup> It is also reprehensible practice, and may be ground for disbarment, for an attorney to use letters written to his client by another for the purpose of compelling a settlement; and if such conduct is coupled with an attempt to extort from such other person more than is justly due, ground for disbarment does exist.<sup>10</sup> So, an attorney may be disbarred for filing a sham petition for the purpose of taking a deposition so as to enable him to publish the tes-

<sup>3</sup> *Wernimont v. State*, 101 Ark. 210, Ann. Cas. 1913D 1156, 142 S. W. 194; *In re O'Connell*, 174 Mass. 253, 53 N. E. 1001, 54 N. E. 558.

<sup>4</sup> *In re Goldberg*, 49 App. Div. 357, 63 N. Y. S. 392.

As to an attorney's liability for the unlawful seizure of property, see *supra*, § 297.

<sup>5</sup> *In re Wartman*, (N. J.) 31 Atl. 1040.

<sup>6</sup> See *supra*, § 296.

<sup>7</sup> *State v. Rohrig*, (Ia.) 139 N. W. 908.

<sup>8</sup> *Wernimont v. State*, 101 Ark. 210, Ann. Cas. 1913D 1156, 142 S. W. 194.

<sup>9</sup> *In re O—*, 73 Wis. 602, 42 N. W. 221.

<sup>10</sup> *In re Harrington*, 146 App. Div. 219, 130 N. Y. S. 920, *denying rehearing* 140 App. Div. 939, 125 N. Y. S. 1123.

timony so taken.<sup>11</sup> But, while the encouragement of litigation by an attorney from any but honest motives is misconduct which may be punished by disbarment,<sup>12</sup> it is not unprofessional to sue upon just claims in a lawful manner, irrespective of the consequences to the defendant.<sup>13</sup>

**§ 818. Interference with Witnesses.** — The first duty of a lawyer is to aid in the administration of justice, the duty to his client being subordinate thereto;<sup>14</sup> and, therefore, it is evident that a lawyer who in any manner attempts to suppress truth, or to prevent a witness from appearing in court, or who seeks colored or untruthful testimony, is guilty of misconduct for which he may, and should be, disbarred.<sup>15</sup> Thus, it has been held that an attorney who prevented a girl, on whom an abortion had been committed, from making an *ante mortem* statement, and, in furtherance of his purpose, directed who should care for her, forbade persons from seeing her, and directed her attendant not to permit her to make any statements concerning herself, her condition, or the cause thereof, was guilty of misconduct for which he might be disbarred.<sup>16</sup> So, an attorney may be disbarred where it appears that he encouraged a witness to conceal himself so as to avoid attendance in court.<sup>17</sup> And where an attorney, who is in charge of the claim department of a corporation, approves vouchers for the disbursements of detectives and investigators for money expended with the witnesses of parties who had brought suits against the company, in keeping such witnesses out of reach of process, paying their hotel bills, and paying the witnesses themselves, and also approves payments made by such agents of the claim department to court officers, clerks, and attendants, and to police officers, physicians, and hospital employees, he will be disbarred.

<sup>11</sup> Ex p. Krieger, 7 Mo. App. 367.

<sup>12</sup> State v. Rohrig, (Ia.) 139 N. W. 908.

<sup>13</sup> Hinekley v. Krug, (Cal.) 34 Pac. 118; People v. Robinson, 32 Colo. 241, 75 Pac. 922.

<sup>14</sup> In re Thomas, 36 Fed. 242.

<sup>15</sup> Bar Assoc. of Boston v. Greenhood, 168 Mass. 169, 46 N. E. 568;

In re Robinson, 140 App. Div. 329, 125 N. Y. S. 193.

<sup>16</sup> In re Shepard, 109 Mich. 631, 67 N. W. 971.

<sup>17</sup> Ex p. Burr, 2 Cranch (C. C.) 379, 4 Fed. Cas. No. 2,186; State Board of Examiners v. Lane, 93 Minn. 425, 101 N. W. 613.

especially where such payments are sufficient in number to show a deliberate system conducing to bribery and subornation of perjury.<sup>18</sup> But every attorney cannot, of course, be imbued with the highest standard of legal ethics, and, indeed, it would be a dangerous rule were it so required;<sup>19</sup> thus, it has been held that an attorney will not be disbarred merely because he seeks to recover the possession of incriminating letters, written by his client, where there is no purpose to suppress evidence which might be relevant in contemplated or pending litigation; but it is otherwise if, in seeking such letters, the attorney makes threats which, if made with a view of extorting money, would have amounted to blackmail.<sup>20</sup> So, where an attorney sent an agent to see a witness for the adverse party, with instructions to endeavor to incline such witness favorably towards his client, and it appeared that the agent, on his own responsibility, made the witness drunk for the purpose of keeping him out of the way, and induced him to see the attorney at the latter's office, it was held that the attorney's misconduct did not warrant disbarment; but it would be otherwise if he had instructed his agent so to conduct himself, or, perhaps, if he had subsequently ratified such conduct.<sup>1</sup>

**§ 819. Inducing Witnesses to Swear Falsely.** — A lawyer who induces, or attempts to induce, a witness to swear falsely, will be disbarred.<sup>2</sup> "While a discreet and prudent attorney may very properly ascertain from witnesses in advance of the trial what they in fact do know, and the extent and limitations of their memory, as a guide to his own examinations, he has no right, legal or moral, to go farther. His duty is to extract the facts from the witness, not to pour them into him; to learn what the witness does know, not to teach him what he ought to know."<sup>3</sup> Thus, where an attorney took out a commission for the examina-

<sup>18</sup> *In re Robinson*, 151 App. Div. 589, 136 N. Y. S. 548.

<sup>19</sup> *In re Thomas*, 36 Fed. 242.

<sup>20</sup> *In re Chadsey*, 141 App. Div. 458, 126 N. Y. S. 456, *affirmed* 201 N. Y. 572, 95 N. E. 1124.

<sup>1</sup> *In re Thomas*, 36 Fed. 242.

<sup>2</sup> *In re Durant*, 89 Conn. 140, 10

Ann. Cas. 539, 67 Atl. 497; *People v. Brown*, 218 Ill. 301, 75 N. E. 907; *State v. Holding*, 1 McCord L. (S. C.) 379.

<sup>3</sup> *In re Eldridge*, 82 N. Y. 616, 37 Am. Rep. 558. (See also mem. in 2 Ky. L. Rep. 75.)



tion of a witness, and wrote out the answers, or a part thereof, so as to put his own words and ideas into the mouth of the witness, and produced such testimony in court, he is unfitted to continue as a member of the bar.<sup>4</sup> Nor can an attorney, who has supervision of the claim department of a corporation, justify an expenditure of the company, with his approval, for the purpose of bribing witnesses and paying for perjured testimony, by showing that many fraudulent claims have been brought against such company; nor will his misconduct be excused by showing that criminal responsibility has been avoided.<sup>5</sup> But where an attorney, believing a certain paper to have been forged, hired an expert to examine it, and, the expert having expressed doubt as to the forgery, the attorney, supposing that the expert actually believed the paper to be forged and expressed doubt only for the purpose of extorting money, offered the expert a large sum to testify in regard to the forgery, it was held that, while the attorney's conduct was subject to criticism, it was not ground for disbarment. In so deciding, the court said: "The respondent knew, or thought he did, that the signature was a forgery, and he seems never to have doubted that [the expert] was of the same opinion, and he regarded, as he well might, the occasional arguments of the witness on the other side as mere intimations that he wanted some money. Under such circumstances, no doubt, it would have been more in accordance with exalted ideas of propriety for [the attorney] to have denounced the witness, and dismissed him; but I doubt whether many practitioners would have acted very differently from the course of the respondent. Lawyers meet and are compelled to contend with all sorts of people. They have in their hands the interests of their client, and they should not permit him to lose the benefit of important testimony upon any refined ideas of propriety. Frequently witnesses whose testimony is essential know the value of their position, and too often attempt to realize upon it. It is a trying thing for an attorney to be placed in a situation where he must deal with such a witness; and, while an honorable attorney would be careful to make no payments or promises which could

<sup>4</sup> In re Eldridge, 82 N. Y. 616, 37 Am. Rep. 558. (See also mem. in 2 Ky. L. Rep. 75.)

<sup>5</sup> In re Robinson, 151 App. Div. 589, 136 N. Y. S. 548.

affect the truthfulness of the evidence, all would try to retain the witness, however much he would be compelled to despise him. I have considered the matter entirely from the standpoint of the respondent; and while I think his conduct, according to his own testimony, may justly be criticised, I do not think it sufficient ground for a disbarment."<sup>6</sup>

**§ 820. Improper Contract with Witnesses.** — It is serious professional misconduct for an attorney to enter into a contract with one whom he expects to call as a witness in a judicial proceeding, whether such person be an expert or not, whereby the compensation of such person for testifying in a particular way is made dependent upon the outcome of the litigation in which he is to testify. Such contracts give a direct encouragement to a witness to shape his testimony according to his interest, and have a tendency to subvert justice by putting a premium on perjury; and an attorney who makes a contract of this character is unfit to remain a member of the bar.<sup>7</sup> It makes no difference whether the testimony thus procured is true or false, or that the contract was induced by a threat of the witness to testify adversely to the case of the party calling him.<sup>8</sup> However, witnesses who are called to give testimony involving special knowledge and skill or requiring examination and study of a particular branch of science may properly be given compensation for the time and labor devoted to the matter about which they are to testify; and it seems that witnesses who are in impoverished circumstances may properly be paid for the time actually lost in attending court. Such cases are not within the condemnation of the rule first stated, for the witness does not receive compensation for swearing to a particular state of facts or to a particular opinion, nor is the amount to be paid him dependent upon the result of the litigation.<sup>9</sup>

<sup>6</sup> *In re Barnes*, (Cal.) 16 Pac. 896.

*State v. Clifton*, 15 Mo. App.

<sup>7</sup> *Matter of Schapiro*, 144 App. Div.

589.

1, 128 N. Y. S. 852; *In re Imperatori*,

<sup>8</sup> *Matter of Schapiro*, 144 App. Div. 1, 128 N. Y. S. 852.

152 App. Div. 86, 136 N. Y. S. 675. See also *Bar Assoc. of Boston v. Greenhood*, 168 Mass. 169, 46 N. E. 568;

<sup>9</sup> *Matter of Schapiro*, 144 App. Div. 1, 128 N. Y. S. 852.

§ 821. **Contract with Detective Formerly Employed by Opponent.** — It has been held that an attorney is guilty of unprofessional conduct in employing, in the interest of his client, a detective, who was formerly employed by the adverse party in the same litigation, to furnish evidence against his former employer. A contract of this character is void as being against public policy, for "no man can serve two masters;" and an attorney who induces one to attempt to do so, is at least censurable.<sup>10</sup>

§ 822. **Permitting Client to Present False Testimony.** — The fidelity which a lawyer owes to his client must not be allowed to override the duty to deal honorably with the court of which he is an officer, and to inform it on the law and the facts of a case in which he appears; and he violates his oath of office when he resorts to deception, or permits his client to do so.<sup>11</sup> An attorney is never justified in continuing a case after he has knowledge of the fact that it is being supported by perjured testimony; and if he proceeds with the trial thereafter, without acquainting the court of the fact that the testimony is false, and seeks to recover judgment on such testimony, his misconduct merits his disbarment.<sup>12</sup> Thus, where an attorney who was employed to prosecute an action for

<sup>10</sup> *Murray v. Lizotte*, 31 R. I. 509, 77 Atl. 231.

<sup>11</sup> *People v. Beattie*, 137 Ill. 553, 27 N. E. 1096, 31 Am. St. Rep. 384; *People v. Case*, 241 Ill. 279, 89 N. E. 638, 25 L.R.A.(N.S.) 578; *In re Mendelsohn*, 150 App. Div. 445, 135 N. Y. S. 438.

*Alteration of Letter to Be Used in Evidence.*—Where an attorney made an alteration in a copy of a letter with which he had been furnished by annexing to the name of the writer the word "Prest.," in order to impart to the letter an official character, by making it appear that the writer thereof was acting as president of a bank, and such copy had been procured for the purpose of using it on

the trial of a suit then pending in which the attorney was counsel for one of the parties, it was ground for disbarment. *Rice v. Com.*, 18 B. Mon. (Ky.) 472.

*But the mutilation of a memorandum book*, by cutting leaves therefrom, is not ground for disbarment where the leaves were preserved, and no fraudulent intention appears. *In re Luce*, 83 Cal. 303, 23 Pac. 350.

<sup>12</sup> *In re Hardenbrook*, 135 App. Div. 634, 121 N. Y. S. 250, *affirmed* 199 N. Y. 539, 92 N. E. 1086; *Matter of Schapiro*, 144 App. Div. 1, 128 N. Y. S. 852; *Matter of Flannery*, 150 App. Div. 369, 135 N. Y. S. 612; *Matter of Mendelsohn*, 150 App. Div. 445, 135 N. Y. S. 438.

personal injury on a contingent fee, agreed to pay the physician who attended the plaintiff a certain sum in the event of a recovery, and during the trial the physician, in the presence of the attorney, denied that he had any interest in the case, and the attorney remained silent, it was held that the attorney's misconduct warranted disbarment, not only because of his silence, but also for having entered into such a contract.<sup>13</sup> It is equally unprofessional for an attorney, in presenting a claim to the legislature, to support the same by false, forged, or fraudulent evidence.<sup>14</sup> Nor is it essential, in order that the disciplinary powers of the court may be exercised, that the attorney should be guilty of a violation of the penal laws; but it is sufficient if it appears that he had a direct knowledge of the fact that his client sought to recover on perjured testimony, and, notwithstanding such knowledge, continued the suit and insisted upon a recovery.<sup>15</sup>

**§ 823. Presenting False Testimony in Disbarment Proceedings.** — The fact that an attorney against whom disbarment proceedings are pending has, at the hearing thereof, presented false testimony in his own behalf to avoid the consequences of his misconduct, is frequently considered, together with the charges proven against him, in determining his guilt,<sup>16</sup> and may of itself be sufficient to warrant his disbarment.<sup>17</sup> Thus, the court said in one case: "Whatever would have been the determination of this court if the respondent had frankly admitted his fault, I can see no escape from the conclusion that, when he has deliberately attempted to escape the consequences of his misconduct by perjured testimony, he is no longer fit to remain a member of the profes-

<sup>13</sup> *In re Schapiro*, 144 App. Div. 1, 128 N. Y. S. 852.

<sup>14</sup> *State v. Fisher*, 82 Neb. 361, 117 N. W. 882, *affirmed on rehearing*, 82 Neb. 367, 119 N. W. 249.

<sup>15</sup> *In re Hardenbrook*, 135 App. Div. 634, 121 N. Y. S. 250.

<sup>16</sup> *In re Cohn*, 120 App. Div. 378, 105 N. Y. S. 84; *In re Joseph*, 135 App. Div. 589, 120 N. Y. S. 793; *In re*

*Spenser*, 143 App. Div. 229, 128 N. Y. S. 168; *In re Voxman*, 148 App. Div. 286, 132 N. Y. S. 217; *In re Levine*, 148 App. Div. 296, 132 N. Y. S. 124.

<sup>17</sup> *In re Rockmore*, 139 App. Div. 71, 123 N. Y. S. 928, where the attorney sought to charge his own embezzlement upon his clerk, who was not expected to appear at the hearing.

sion.”<sup>18</sup> And, of course, where testimony of this character is palpably false, it is clear that it should be taken into consideration against the respondent; but it would seem that where there is room for doubt—even a reasonable doubt—the fact that the findings are adverse to the respondent should not militate against him. “The issue is vital to the party assailed. An adverse decision dooms him always to disgrace, and often to poverty and want. His professional life is full of adversaries. Always in front of him there is an antagonist, sometimes angry and occasionally bitter and venomous. His duties are delicate and responsible, and easily subject to misconstruction. To say that when he denies the charges brought against him he may be tried without the rights and the safeguards which belong to the humblest criminal, would be to adopt a dangerous rule, and one without reason or justification.” The remarks quoted were made in considering the respondent’s right to a hearing, but they are not inapplicable here.<sup>19</sup>

**§ 824. Advocating False or Fictitious Claims.** — Nor is it any part of an attorney’s duty to lend his professional aid to the establishment of claims which he knows to be false or fictitious, nor should he advocate such claims in his own behalf.<sup>20</sup> Thus an attorney is guilty of misconduct warranting his disbarment when he presents a false complaint and a false account in an action brought by him to recover for services rendered to a client,<sup>1</sup> or when he obtains an order extending the time for the service of a complaint on his own affidavit stating that the plaintiff has a good cause of action, when, in fact, the plaintiff had previously informed him that he had no just claim, and directed him to discontinue and abandon the action.<sup>2</sup> So, an attorney is guilty of gross misconduct where he fails to object, in the interest of his client, to the account of an executor who has neglected to charge himself with an amount due to the estate which he represents, and it is

<sup>18</sup> In re Smith, 148 App. Div. 291, 132 N. Y. S. 304.

<sup>19</sup> In re Eldridge, 82 N. Y. 161, 37 Am. Rep. 558. (See also mem. in 2 Ky. L. Rep. 75.)

<sup>20</sup> Matter of V——, 10 App. Div.

491, 42 N. Y. S. 268; Serfass’s Case, 116 Pa. St. 455, 9 Atl. 674.

<sup>1</sup> Matter of Ryan, 143 N. Y. 528, 38 N. E. 963.

<sup>2</sup> In re Hansen, 120 App. Div. 377, 105 N. Y. S. 159.

immaterial that the attorney subsequently threatened, privately, to file such an objection unless the executor paid the amount to his client.<sup>3</sup> And where an attorney filed answers in support of motions to open certain defaults, when he knew that the judgments therein had been taken on complaints that were true, and that the answers were false, his suspension is justified.<sup>4</sup> So, an attorney will be disbarred where he advises his client to verify a complaint which the attorney knew to be false, and led the client to suppose that it had been corrected before verification.<sup>5</sup> But disbarment will not be ordered merely because the grounds of a motion, presented by an attorney, are not supported by the facts in the case.<sup>6</sup>

**§ 825. Presenting Fictitious Case to Court.**—It is professional misconduct for an attorney, under the guise of submitting an agreed case to the court, to present a fictitious one, for the purpose of obtaining a decision thereon. Such procedure constitutes a fraud and imposition. "Courts are constituted to decide actual questions existing between parties who are real and who have a real controversy. And the law has carefully hedged about the submission of controversies between parties with such formalities and solemn requirements as will prevent anxious persons from improperly resorting to its aid, and at the same time furnish real litigants an easy mode of invoking its authority. A proper regard for the dignity of the court, a just recognition of its relation to the public, and a proper conception of the office of a lawyer, require a due observance of these formalities in order that the court may properly discharge its obligations and fulfil its public function. Otherwise the source of its authority is corrupted, and the administration of justice is brought into contumely and disrepute."<sup>7</sup>

<sup>3</sup> Bar Assoc. of Boston *v.* Greenhood, 168 Mass. 169, 46 N. E. 568.

<sup>4</sup> In re Goodman, 199 N. Y. 143, 92 N. E. 211, *affirming order*, 135 App. Div. 594, 120 N. Y. S. 801.

<sup>5</sup> People *v.* Pearson, 55 Cal. 472.

<sup>6</sup> Fletcher *v.* Daingerfield, 20 Cal. 427.

<sup>7</sup> Matter of V——, 10 App. Div. 491, 42 N. Y. S. 268. See also Lord *v.* Veazie, 8 How. 255, 12 U. S. (L. ed.) 1069.

§ 826. **Making False Statements to Court.**— Under no circumstances will an attorney be justified in making false statements to the court.<sup>8</sup> Thus, an attorney has been disbarred for stating, in an action for divorce wherein he appeared for the plaintiff, that he knew that the plaintiff had acquired a residence in the state, when, in fact, such statement was false.<sup>9</sup> Nor is an attorney relieved from his obligation to the court to aid it in the due administration of justice, by the fact that he becomes the director of a corporation; and he may be disbarred for making false statements, for the purpose of deceiving the court, to the effect that the books of such corporation could not be produced.<sup>10</sup>

§ 827. **False Affidavits.**— The knowing presentation to the court of false or fictitious affidavits by an attorney constitutes ground for disbarment.<sup>11</sup> Thus, disbarment may be predicated on the filing of forged affidavits,<sup>12</sup> or on the filing of papers, in the nature of affidavits, falsely purporting to have been sworn to.<sup>13</sup> And where an attorney persuades one to appear in the United States land office, and to make oath to an affidavit, falsely personating and representing himself to be another, he will be disbarred.<sup>14</sup> So where, in an action to divorce a second wife, the attorney for the plaintiff presented depositions of the plaintiff's children that their stepmother had treated them cruelly, after he had, as attorney for the husband in a proceeding to be relieved from the payment of alimony to his first wife, presented the depo-

<sup>8</sup> *In re Schleimer*, 150 App. Div. 507, 135 N. Y. S. 406. See also *In re Keegan*, 31 Fed. 129.

<sup>9</sup> *Reno Bar Ass'n v. Scoular*, 34 Nev. 313, 123 Pac. 13.

<sup>10</sup> *In re Robinson*, 140 App. Div. 329, 125 N. Y. S. 193.

<sup>11</sup> *Illinois*.—*People v. Piekler*, 186 Ill. 64, 57 N. E. 893.

*Indiana*.—*Ex p. Walls*, 64 Ind. 461.

*Minnesota*.—*In re Arcander*, 26 Minn. 25, 1 N. W. 43.

*New York*.—*In re Doyle*, 138 App. Div. 99, 122 N. Y. S. 1000. And see

*In re Zatulove*, 156 App. Div. 79, 141 N. Y. S. 75.

*North Dakota*.—*In re Crum*, 7 N. D. 316, 75 N. W. 257.

*Pennsylvania*.—*In re Shoemaker*, 38 W. N. C. 414. *affirming* 5 Pa. Dist. Ct. 161, 38 W. N. C. 54.

*South Carolina*.—*In re Duncan*, 81 S. C. 290, 62 S. E. 406.

<sup>12</sup> *People v. Piekler*, 186 Ill. 64, 57 N. E. 893; *Ex p. Walls*, 64 Ind. 461.

<sup>13</sup> *State v. Finn*, 32 Ore. 519, 52 Pac. 756, 67 Am. St. Rep. 550.

<sup>14</sup> *In re Badger*, 4 Idaho 66, 35 Pac. 839.

sitions of the same children to the effect that their stepmother treated them well, and dwelt harmoniously with her husband, his conduct is a violation of his duty to the court, and, as such, censurable.<sup>15</sup> Even where an attorney is a party to a pending action, he may be disbarred for the filing of false affidavits and sham answers therein.<sup>16</sup> And where an affidavit containing false statements was subscribed, but not sworn to, by an attorney at law, his conduct, while not amounting to perjury, is nevertheless unprofessional, and he may be stricken from the roll therefor.<sup>17</sup> So, an attorney will be reprimanded for his misconduct in making an affidavit for the removal of a cause to the federal court on the ground of local prejudices, where his real reason therefor was to secure an advantage owing to a difference in the holdings of the state court respecting stipulations for attorney's fees.<sup>18</sup> But it seems that the mere fact that an attorney has been implicated in the making of a false affidavit, is not ground for disbarment in the absence of proof that such affidavit has been used, or of an attempt to use it.<sup>19</sup> An attorney at law who voluntarily makes a false affidavit to be used in a judicial proceeding in which he is not acting as attorney cannot be suspended from practice for that reason, since he is absolutely privileged to the same extent as any other witness from any punishment except a criminal prosecution for perjury.<sup>20</sup>

**§ 828. Falsifying and Abstracting Public Records and Papers.**—An attorney who, in any manner, alters, or otherwise falsifies, any public record, or paper in the nature thereof, or who abstracts the same from the files, may be disbarred. It has been so held as to the alteration of the record of a litigation,<sup>1</sup> and as to

<sup>15</sup> *In re Schleimer*, 150 App. Div. 507, 135 N. Y. S. 406.

<sup>16</sup> *In re Bauder*, 128 App. Div. 346, 112 N. Y. S. 761.

<sup>17</sup> *In re Keegan*, 31 Fed. 129.

<sup>18</sup> *In re Breckenridge*, 31 Neb. 489, 48 N. W. 142.

<sup>19</sup> *In re Watson*, 83 Neb. 211, 119 N. W. 451.

<sup>20</sup> *Beckner v. Com.*, 126 Ky. 318, 103 S. W. 378, 31 Ky. L. Rep. 708.

As to crimes generally, see *infra*, §§ 853–864.

<sup>1</sup> *Illinois*.—*People v. Murphy*, 119 Ill. 159, 6 N. E. 488; *People v. Hooper*, 218 Ill. 313, 75 N. E. 896.

*Mississippi*.—*Ex p. Brown*, 1 How. 303.



the alteration of judgments and decrees,<sup>2</sup> an order of court,<sup>3</sup> a return,<sup>4</sup> affidavits,<sup>5</sup> memorandum of dismissal,<sup>6</sup> bill of exceptions,<sup>7</sup> an undertaking,<sup>8</sup> notes of testimony,<sup>9</sup> a receiver's report,<sup>10</sup> a recorder's receipt,<sup>11</sup> and tax lists,<sup>12</sup> or the forging of a satisfaction of judgment.<sup>13</sup> So, an attorney who forges the name of the register to a paper purporting to be a copy of an order declaring a marriage void, will be disbarred.<sup>14</sup> And where an attorney altered a letter written by one judge to another concerning a matter of official business, he was disbarred.<sup>15</sup> So, an attorney who induces a clerk of the court to antedate the filing of a paper, is guilty of misconduct for which he may be disbarred.<sup>16</sup> It is also ground for disbarment to abstract public records from their proper resting place without permission,<sup>17</sup> and it is equally reprehensible for an attorney to secrete such papers after having lawfully received them; and where, in such a case, an attorney admitted the loss of certain papers by a friend, but failed otherwise to account for them, or to give the name of such friend, he was disbarred.<sup>18</sup> But

*Missouri*.—*State v. Mullins*, 129 Mo. 231, 31 S. W. 744.

*New York*.—*Matter of V.*, 10 App. Div. 491, 42 N. Y. S. 268.

*Oregon*.—*Whalley v. Tongue*, 29 Ore. 48, 43 Pac. 717.

*Pennsylvania*.—*Bristol v. Tasker*, 135 Pa. St. 110, 19 Atl. 851, 853, 20 Am. St. Rep. 853, 26 W. N. C. 40.

<sup>2</sup> *State v. Finley*, 30 Fla. 325, 11 So. 674, 18 L.R.A. 401; *State v. Cadwell*, 16 Mont. 119, 40 Pac. 176; *In re Freerks*, 11 N. D. 120, 90 N. W. 265.

<sup>3</sup> *People v. Oishei*, 20 Misc. 163, 12 N. Y. Crim. 362, 45 N. Y. S. 49.

<sup>4</sup> *In re Washington*, 82 Kan. 829, 109 Pac. 700.

<sup>5</sup> *People v. Leary*, 84 Ill. 190; *In re Washington*, 82 Kan. 829, 109 Pac. 700; *Ex p. Loew*, 5 Hun (N. Y.) 462, 50 How. Pr. 373.

<sup>6</sup> *Ex p. Lundy*, 8 Ohio Cir. Dec. 111, 14 Ohio Cir. Ct. 561.

<sup>7</sup> *People v. Moutray*, 166 Ill. 630, 47 N. E. 79.

<sup>8</sup> *In re Goldberg*, 79 Hun 616 mem., 29 N. Y. S. 972.

<sup>9</sup> *State v. Harber*, 129 Mo. 271, 31 S. W. 889; *Ex p. St. Rayner*, (Ore.) 70 Pac. 537.

<sup>10</sup> *In re Henderson*, 88 Tenn. 531, 13 S. W. 413.

<sup>11</sup> *In re Serfass*, 2 Pa. Co. Ct. 649, 116 Pa. St. 455, 9 Atl. 674, 19 W. N. C. 476.

<sup>12</sup> *In re Nunn*, 73 Minn. 292, 76 N. W. 38.

<sup>13</sup> *In re Heymann*, 156 App. Div. 73, 140 N. Y. S. 1065.

<sup>14</sup> *In re Peterson*, 3 Paige (N. Y.) 510.

<sup>15</sup> *Baker v. Com.*, 10 Bush (Ky.) 592.

<sup>16</sup> *Howard v. Gulf, C. & S. F. R. Co.*, (Tex.) 135 S. W. 707.

<sup>17</sup> *People v. Hooper*, 218 Ill. 313, 75 N. E. 896; *In re Gates*, (Pa.) 2 Atl. 214, 17 W. N. C. 142.

<sup>18</sup> *State v. Maxwell*, 19 Fla. 31.

where an attorney was charged with stealing an indictment from the files, and it appeared that at one time, while the indictment was in his possession, he denied having it, but, on discovering his mistake, he returned it secretly to the files, the court refused to disbar him.<sup>19</sup>

§ 829. **Offering False or Fictitious Sureties.**—An attorney who induces, or attempts to induce, or who participates in the inducement of a court to accept a bond or undertaking with false or fictitious sureties, perpetrates a fraud upon the court which subjects him to disbarment.<sup>20</sup> And where an attorney signed the names of alleged sureties to an undertaking, and delivered the same to a notary public to obtain the necessary affidavits as to the sureties' qualifications, but the notary, making no attempt to carry out these instructions, attached his seal and subscribed his name without having secured the required affidavit, and it appeared that the attorney was aware of, if not a party to, the scheme, he was suspended from practice.<sup>1</sup> So, an attorney will be disbarred for instructing one, whom he presents as a surety, to swear falsely in justifying; and it has also been intimated that an attorney will be suspended for negligently allowing one to qualify as a surety, when he should have known that such surety was swearing falsely at the time he justified. In this connection the court said: "We wish to be distinctly understood as saying that an attorney is not responsible for the character of the bail presented by his client, unless there is some fact or circumstance which should rouse suspicion or put him on inquiry. If nothing appears to the contrary, he may take it for granted that the principal is honest, and that the sureties do not intend to commit perjury. But an attorney who undertakes to procure bail, not only assumes the responsibility that a party is under when acting for himself, but should act with more circumspection in view of his duty to the court. He cannot get rid of this obligation by employing a subordinate and then closing his eyes to what the latter does."<sup>2</sup>

<sup>19</sup> *State v. Chapman*, 11 Ohio 430.

<sup>20</sup> *People v. Pickler*, 186 Ill. 64, 57 N. E. 593.

<sup>1</sup> *Ex p. Ditchburn*, 32 Ore. 538, 52 Pac. 694.

<sup>2</sup> *In re Hirst*, 9 Phila. (Pa.) 216, 31 Leg. Int. 340, 1 W. N. C. 18.

§ 830. **Interference with Jurors.** — An attorney who attempts to interfere with jurors, and to influence their judgment, deserves disbarment and the severest condemnation. The law is watchfully jealous of the purity and independence of juries, which are regarded as essential to the administration of justice and the protection of individual freedom, and any undue interference therewith, no matter by whom, will be rebuked, and, possibly, an offender in this respect may also be punishable for a violation of the penal laws. Wrongs of this character are especially aggravating when they are committed by counsel who are sworn officers of the court, and “whose duty it is to act as guardians of the fountains of justice, and who are false to their charge, when they defile or taint those waters, which they are pledged to keep pure and unpolluted. Such conduct in counsel is a gross breach of trust, for which a removal from the trust is but an inadequate punishment.”<sup>3</sup>

§ 831. **Fraud.** — It is a sufficient ground for disbarment for an attorney to perpetrate, or aid in the perpetration of, a fraud. Thus, where an attorney procured judgment on a note with knowledge of the fact that such note was given for the purpose of perpetrating a fraud upon the maker thereof, or his creditors, he may be disbarred.<sup>4</sup> So, where an attorney, for the purpose of procuring a large sum of money, disproportionate to legitimate fees, caused suit to be brought on certain notes which he knew to have been paid, and procured a reputable attorney, who was unacquainted with the facts, to bring such suit and verify the petition therein, he was guilty of unprofessional conduct involving moral turpitude, and disbarred.<sup>5</sup> And an attorney who procures fraudulent personal injury claims from several clients, and obtains settlements therein, is guilty of professional misconduct which warrants his disbarment.<sup>6</sup> So an attorney is subject to disbarment for filing fraudulent certificates to collect witness fees to which he is not

<sup>3</sup> In re Carter, 1 Phila. (Pa.) 507, 11 Leg. Int. 210.

<sup>4</sup> People v. Keegan, 18 Colo. 237, 32 Pac. 424, 26 Am. St. Rep. 274.

<sup>5</sup> In re Thatcher, 83 Ohio St. 246, 22 Ann. Cas. 810, 93 N. E. 895.

<sup>6</sup> In re Mendelsohn, 150 App. Div. 445, 135 N. Y. S. 433.

entitled <sup>7</sup> or for fraudulently leading his adversary to believe that a proceeding had been dropped, whereby a default judgment was obtained.<sup>8</sup> Fraud and deceit toward the court,<sup>9</sup> and the client,<sup>10</sup> have been heretofore considered.

### § 832. Fraud and Other Misconduct in Divorce Cases. —

An attorney may be disbarred for conspiring to procure a decree in divorce on grounds which, to his knowledge, do not exist.<sup>11</sup> And where a husband, who applied to an attorney for the purpose of bringing a divorce suit, was informed that he had no grounds on which to bring such suit, but that his wife had, and the attorney subsequently began suit in the name of the wife, without her authority, claiming to do so on the request of an unknown person whom he supposed was a mutual friend of the parties, his conduct was held to justify disbarment.<sup>12</sup> So, also, disbarment may be inflicted where an attorney signs affidavits in his client's name, without her consent, in divorce proceedings, and seeks to obtain service by publication, although he knew that the respondent was a resident of the state.<sup>13</sup> And an attorney, employed to procure a divorce for a husband, who deliberately attempted, by hired agents, to induce the wife to commit adultery, or to place her in such a situation that adultery would be presumed, is guilty of gross professional misconduct, justifying disbarment.<sup>14</sup> An attorney who enters into collusion with one spouse for the purpose of manufacturing evidence either for him or against the other spouse, in order to procure a divorce, will be disbarred.<sup>15</sup> So, it will constitute ground for disbarment where an attorney falsely states, in the bill of complaint in a divorce action, that his client is a resident of the state, and allows his client to give evidence in support of such statement, when he knows the falsity thereof;<sup>16</sup> and it is equally reprehensible for an attorney to deceive his client

<sup>7</sup> *Bar Assoc. of Boston v. Scott*, 209 Mass. 200, 95 N. E. 402.

<sup>8</sup> *People v. Hooper*, 218 Ill. 313, 75 N. E. 896.

<sup>9</sup> See *supra*, § 778.

<sup>10</sup> See *supra*, § 796.

<sup>11</sup> *People v. Huggard*, 217 Ill. 366, 75 N. E. 371.

<sup>12</sup> *Dillon v. State*, 6 Tex. 55.

<sup>13</sup> *People v. Huggard*, 217 Ill. 366, 75 N. E. 371.

<sup>14</sup> *In re Bayles*, 156 App. Div. 663, 141 N. Y. S. 1052.

<sup>15</sup> *In re Gale*, 75 N. Y. 526.

<sup>16</sup> *People v. Beattie*, 137 Ill. 553, 27 N. E. 1096, 31 Am. St. Rep. 384.

by giving her what purports to be a copy of a decree in divorce before any decree has been entered, in reliance upon which his client married another person.<sup>17</sup> And where the commencement of a divorce action is encouraged by an attorney from unworthy motives, such as passion or interest, he may be disbarred.<sup>18</sup> An attorney will also be disbarred where it appears that he induced a woman to make a false statement to a client to the effect that such woman was guilty of adultery with the client's husband.<sup>19</sup> So, an attorney will be disbarred where he fails to inform the court that a divorce action presented to it had been previously decided by another court.<sup>20</sup> It is also unprofessional conduct for an attorney to employ a detective in a divorce suit, who had been formerly employed by the adverse party.<sup>1</sup> But it has been held that where a husband and wife enter into collusion for the purpose of dissolving their marriage, the presentation of an application for divorce for one of the parties by an attorney who had knowledge of the collusion is not an intentional fraud, showing moral turpitude, either upon the court or a client.<sup>2</sup>

**§ 833. Conspiracy to Extort Money.** — Where it appeared that an attorney organized a conspiracy for the purpose of embarrassing and harassing a corporation, and extorting money from it, it was held that his misconduct required disbarment. It was argued, in that case, that the respondent acted openly and under a claim of right, and in answer to such contention the court said: "This argument would carry weight if the respondent had been in good faith attempting to organize a corporation for a lawful purpose; but while pretending to do so, his sole object was the dishonest and unlawful purpose of extorting money by interfering with the established business of a corporation already organized. He did not intend to engage in the business for the purpose for which he pretended to organize his corporation, but he intended

<sup>17</sup> *People v. Beattie*, 137 Ill. 553, 27 N. E. 1096, 31 Am. St. Rep. 384.

<sup>18</sup> *State v. Rohrig*, (Ia.) 139 N. W. 908.

<sup>19</sup> *In re Durant*, 80 Conn. 140, 10 Ann. Cas. 539, 67 Atl. 497.

<sup>20</sup> *People v. Case*, 241 Ill. 279, 89 N. E. 638, 25 L.R.A. (N.S.) 578.

<sup>1</sup> *Murray v. Lizotte*, 31 R. I. 509, 77 Atl. 231.

<sup>2</sup> *In re Cahill*, 66 N. J. L. 527, 50 Atl. 119.

to demand money for not doing so. The standard of personal and professional integrity which should be applied to persons admitted to practice law in the courts is not satisfied by such conduct as merely enables them to escape the penalties of the criminal law. The statute and the rules of this court require a good moral character as a condition precedent to a license as an attorney. This includes at least common honesty, and is not consistent with an effort to obtain a part of the wealth of another by any means not denounced by the criminal statutes.”<sup>3</sup>

**§ 834. Organizing Sham Corporations for Unlawful Purposes.** — It has been held that it is professional misconduct, affording ground for disbarment, for attorneys to organize a sham corporation, with neither capital nor business other than as a medium for bringing suits in the federal courts which could not be brought there by the real parties in interest, and to use such corporation, after its illegal character had been adjudged, in bringing suits in a state court.<sup>4</sup>

**§ 835. Compromising Criminal Cases.** — The unlawful compromise of a criminal charge will constitute ground for disbarment where it amounts to the compounding of a crime;<sup>5</sup> and where a crime may be compromised with the consent of the committing magistrate only, an attorney who undertakes such a compromise, without having obtained such consent, is guilty of professional misconduct;<sup>6</sup> but where an attorney has been tried and acquitted of a crime, he will not be disbarred because, pending the criminal proceedings, he asked the district attorney for time in order that he might fix up the case with the prosecutor.<sup>7</sup>

<sup>3</sup> *People v. Macauley*, 230 Ill. 208, 82 N. E. 612, 120 Am. St. Rep. 287. See also *Gelders v. Haygood*, 182 Fed. 109.

<sup>4</sup> *Gelders v. Haygood*, 182 Fed. 109. See also *People v. Macauley*, 230 Ill. 208, 82 N. E. 612, 120 Am. St. Rep. 287.

<sup>5</sup> *In re Hart*, 131 App. Div. 661, 116 N. Y. S. 193.

As to disbarment for crime generally, see *infra*, §§ 853-864.

<sup>6</sup> *In re Woytisek*, 120 App. Div. 373, 105 N. Y. S. 144.

<sup>7</sup> *Ex p. Trumbore*, 39 Leg. Int. (Pa.) 256.

§ 836. **Obstruction of Justice.** — The fidelity of an attorney to his client does not justify an evasion of the fair operation of the law, or an obstruction, or attempt to obstruct, the due administration of justice.<sup>8</sup> Thus, it has been held that an attorney will be disbarred where he induced a United States commissioner, who informed him that he relied solely on his arguments, to permit a prisoner charged with murder in the first degree to give bail, and who thereupon escaped.<sup>9</sup> So, an attorney who advises a client, out on bail, to forfeit his recognizance, or, knowing that he intended to forfeit it, made no suggestion thereof to the court, may be disbarred.<sup>10</sup> Likewise an attorney for a fugitive from justice who offers to forward a letter to throw the authorities off the scent, and to bribe an officer, and informs the authorities that he does not know the fugitive's whereabouts, will be disbarred.<sup>11</sup> And where an attorney who had been paid certain money by mistake, promised to hold the same for certain purposes, or return it to the payer, when threatened with an injunction, but, notwithstanding such promise, paid it out to his client less his fees, it was held that he was guilty of unprofessional conduct involving moral turpitude.<sup>12</sup> It is also unprofessional conduct, meriting disbarment, for an attorney to advise his client to disregard an order of the court,<sup>13</sup> or to prevent the examination of an execution debtor in supplementary proceedings.<sup>14</sup> But it has been held that an attorney will not be disbarred merely because he advised his client to remove money and other property from a certain deposit vault, and to place them elsewhere, in order to avoid an attachment.<sup>15</sup> Nor is it unprofessional conduct for an attorney to lend his client money from time to time, without attempting to control its application, and to take an assignment therefor, with knowledge of the fact that an order of

<sup>8</sup> *Ex p. Giberson*, 4 Cranch (C. C.) 503, 10 Fed. Cas. No. 5,388. See also *Wernimont v. State*, 101 Ark. 210, Ann. Cas. 1913D 1156, 142 S. W. 194.

<sup>9</sup> *State v. Burr*, 19 Neb. 593, 28 N. W. 261.

<sup>10</sup> *In re Pascal*, 146 App. Div. 836, 131 N. Y. S. 823.

<sup>11</sup> *In re Billington*, 156 App. Div. 63, 141 N. Y. S. 16.

<sup>12</sup> *In re Cunningham*, 9 Ohio Dec. (Reprint) 717, 16 Cine. L. Bul. 447.

<sup>13</sup> *Coffin v. Burstein*, 68 App. Div. 22, 74 N. Y. S. 274.

<sup>14</sup> *Ex p. Miller*, 37 Ore. 304, 60 Pac. 999.

<sup>15</sup> *People v. Robinson*, 32 Colo. 241, 75 Pac. 922.

support had been made against such client.<sup>16</sup> So, an attorney will usually be protected where he acts in good faith, even though he may be technically in fault; thus, where a certain judge ordered a guardian not to pay out any part of a trust fund excepting on an order of the court, and refused to grant such an order to an attorney in payment of his services because his claim was not properly itemized, it was held that the attorney would not be disbarred for obtaining the money from such guardian, after informing him of the facts, where it also appeared that the judge who refused to make the order was without jurisdiction, and that the attorney had submitted the matter to another judge, who promised to sign such order.<sup>17</sup>

**§ 837. Obstruction by Corporation Claim Department under Supervision of Attorney.** — Whether an attorney represents a corporation or an individual, his duty is clear in so far as refraining from an actual perversion or obstruction of justice is concerned. He cannot shut his eyes to a system maintained by his subordinates whereby material witnesses are kept away from court, testimony is purchased, and other wrongs equally reprehensible are committed. The affirmative duty to protect the courts from perjury and fraud rests with him. In a recent case it appears that the attorney for a corporation, against whom many actions for damages were pending, approved of expenditures, made by the corporation claim department, for purposes which tended to impede and obstruct the administration of justice, as, for instance, to pay their witnesses to give colored or false testimony, to keep the witnesses of the adverse party out of court, and to influence court officers and attendants, and physicians and hospital attendants, to aid, by testimony and otherwise, the corporation in its litigation, and it was held that such attorney should be disbarred, and that it was immaterial whether he devised such objectionable methods, or whether he inherited or developed them.<sup>18</sup>

<sup>16</sup> In re Reese's Estate, 41 Pa. Super. Ct. 72.

<sup>18</sup> In re Robinson, 151 App. Div. 589, 136 N. Y. S. 548.

<sup>17</sup> In re Kowalsky, (Cal.) 35 Pac. 77.



§ 838. **Preventing Extradition.** — It has been held that an attorney is not guilty of unprofessional conduct, meriting disbarment, in attempting to prevent the extradition of a client, charged with perjury, from one state to another, excepting in accordance with the law. And where it appeared, in such proceedings, that the fugitive, upon being admitted to bail pending the extradition proceedings, left the jurisdiction on a boat chartered by his attorney, but there was no proof of an intention to forfeit his bail and thereby to evade extradition, or that the attorney had any such unlawful purpose in view, the court will not assume an unlawful intention on the part of the attorney, and he will not be disbarred.<sup>19</sup>

*Fraud in Procuring Admission, and Unauthorized Acts and Practice.*

§ 839. **Fraud in Procuring Admission Generally.** — One who has been admitted to practice law by the perpetration of a fraud in connection with his application for admission, will be disbarred.<sup>20</sup> So, an attorney who moves for the admission to practice of one whom he knows to be ineligible, and conceals that fact from the court, is guilty of misconduct for which he may be disbarred;<sup>1</sup> as is one who knowingly executes a false affidavit as to the term of service of a law student in his office, thereby fraudulently procuring the student's admission to the bar.<sup>2</sup> Thus, an attorney will be disbarred where, on his application for admission, he concealed from the court facts which tended to show that

<sup>19</sup> In re Kaffenburgh, 188 N. Y. 49, 80 N. E. 570, affirming 115 App. Div. 346, 101 N. Y. S. 507.

<sup>20</sup> In re Bradley, 14 Idaho 784, 96 Pac. 208; In re Leonard, 127 App. Div. 493, 111 N. Y. S. 905, affirmed 193 N. Y. 655, 87 N. E. 1121; In re Singer, 156 App. Div. 85, 141 N. Y. S. 74; Ex p. Brown, 2 Pittsb. (Pa.) 152; Vernon County Bar Ass'n v. McKibbin, 153 Wis. 350, 141 N. W. 283. An attorney who concealed from the court, on his application for admission, that

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he had been convicted of a crime in another state and had been disbarred by a local court of that state, will be disbarred, although at the time of his application he had been pardoned of the crime, and a petition for his reinstatement was pending. Matter of Pritchett, 122 App. Div. 8, 106 N. Y. S. 847.

<sup>1</sup> In re Deringer, 12 Phila. (Pa.) 217, 34 Leg. Int. 248, 4 W. N. C. 200.

<sup>2</sup> In re Zatulove, 156 App. Div. 79, 141 N. Y. S. 75.

his reputation for morality was bad, and which, had they been disclosed, would have resulted in a denial of his application for admission in the first instance.<sup>3</sup> Disbarment will also result where it appears that an attorney, in applying for admission as a practitioner from a sister state, presents to the court, as evidence of his good moral character and standing in such other state, a forged letter.<sup>4</sup> It has been held, however, that a minor concealment or discrepancy in connection with the facts relating to the time of clerkship served are not, in themselves, sufficient to warrant disbarment; but a wilful and clear misstatement of such facts would certainly be enough.<sup>5</sup>

**§ 840. Concealment of Prior Disbarment.**—An attorney will also be disbarred where it appears that, in applying for admission to practice, he concealed from the court the fact that he had been disbarred in a sister state;<sup>6</sup> and it is immaterial, it seems, whether such prior disbarment was justified or not.<sup>7</sup> An application for admission, under these circumstances, usually involves the presentation of false certificates or affidavits which, in themselves, constitute a ground for disbarment.<sup>8</sup> So, it has been

<sup>3</sup> *People v. Gilmore*, 214 Ill. 569, 73 N. E. 737, 69 L.R.A. 701; *People v. Propper*, 220 Ill. 455, 77 N. E. 208; *In re Kristeller*, 154 App. Div. 556, 139 N. Y. S. 64; *In re O'Grady*, 4 W. N. C. (Pa.) 199. Compare *State v. Gebhardt*, 87 Mo. App. 542.

<sup>4</sup> *In re Woodward*, 27 Mont. 355, 71 Pac. 161.

<sup>5</sup> See *Ex p. Hill*, 2 W. Bl. (Eng.) 991; *Matter of Page*, 1 Bing. 160, 8 E. C. L. 451, 7 Moo. C. Pl. 572, 1 L. J. C. Pl. 45; *Matter of —*, 2 B. & Ad. 766, 22 E. C. L. 180, 9 L. J. K. B. 321; *In re Holland*, 6 U. C. Q. B. O. S. 441; *People v. Comstock*, 176 Ill. 192, 52 N. E. 67.

<sup>6</sup> *California*.—*In re Lowenthal*, 61 Cal. 122.

*Colorado*.—*People v. Campbell*, 26 Colo. 481, 58 Pac. 591.

*Georgia*.—*Propper v. Owens*, 136 Ga. 787, 72 S. E. 242.

*Illinois*.—*People v. Hahn*, 197 Ill. 137, 64 N. E. 342.

*New York*.—*In re Marx*, 115 App. Div. 448, 101 N. Y. S. 680; *In re Pritchett*, 122 App. Div. 8, 106 N. Y. S. 847.

*North Dakota*.—*In re Olmstead*, 11 N. D. 306, 91 N. W. 943.

*Oklahoma*.—*In re Mosher*, 24 Okla. 61, 20 Ann. Cas. 209, 102 Pac. 705, 24 L.R.A. (N.S.) 530.

*Tennessee*.—*State Board of Law Examiners v. Williams*, 116 Tenn. 51, 92 S. W. 521.

<sup>7</sup> *In re Pritchett*, 122 App. Div. 8, 106 N. Y. S. 847.

<sup>8</sup> *In re Bradley*, 14 Idaho 784, 96 Pac. 208; *In re Leonard*, 127 App. Div. 493, 111 N. Y. S. 905, *affirmed* 193 N.

held that one who applied for admission in the state of New York on the strength of the fact that he was a member of the bar of Texas, but concealed from the court the fact that he had been disbarred in Virginia, while practicing there under an assumed name, will be suspended from practice.<sup>9</sup> But it seems that the failure of an attorney, in applying for admission to the bar of a sister state, to disclose to the court the fact that disbarment proceedings are pending against him in the state of his former domicile, does not materially affect his moral character or his right to admission.<sup>10</sup>

**§ 841. Unauthorized Acts.** — An attorney's general authority is well defined,<sup>11</sup> and if he acts without authority, or exceeds his authority, and thereby is guilty of grave unprofessional conduct, such, for instance, as may result in a perversion of justice, or with serious detriment to his client, he would undoubtedly be subject to such disciplinary measure as the court might see fit to exercise in view of the circumstances disclosed.<sup>12</sup> Thus where an attorney undertakes, without authority, to act in a divorce proceeding, and to procure a decree of divorce therein, he may be disbarred.<sup>13</sup> So, where an attorney, without the authority of the plaintiff, brings an action for personal injuries, and serves pleadings therein with knowledge of the fact that his alleged client has repudiated his assumed authority, and has refused to allow him to represent her, and to verify the pleadings prepared by him, he is guilty of misconduct for which he may be disbarred.<sup>14</sup>

**§ 842. Unauthorized Practice.** — In several jurisdictions certain restrictions are placed upon practicing attorneys,<sup>15</sup> and in some instances the failure to comply with regulations of this character amounts to criminal misconduct which, in itself, is

Y. 655, 87 N. E. 1121; *Dean v. Stone*, 2 Okla. 13, 35 Pac. 578.

<sup>9</sup> *In re Marx*, 115 App. Div. 448, 101 N. Y. S. 680.

<sup>10</sup> *In re Hovey*, 1 Cal. App. xviii. mem., 81 Pac. 1019.

<sup>11</sup> See *supra*, §§ 199-283.

<sup>12</sup> *Clark v. Willett*, 35 Cal. 534.

<sup>13</sup> *People v. Huggard*, 217 Ill. 366, 75 N. E. 371; *Dillon v. State*, 6 Tex. 55.

<sup>14</sup> *In re Mendelsohn*, 150 App. Div. 445, 135 N. Y. S. 438.

<sup>15</sup> See *supra*, §§ 69-71.

usually a ground for disbarment.<sup>16</sup> Thus it is ground for disbarment to practice under the name of a firm with which respondent is not connected,<sup>17</sup> or which has ceased to exist.<sup>18</sup> So, too, it has been held that an attorney is responsible for the methods adopted

<sup>16</sup> See *infra*, § 853.

<sup>17</sup> In re Gluck, 139 App. Div. 894, 123 N. Y. S. 857.

<sup>18</sup> It was contended, in such a case, that, under the provisions of the partnership law of the state, "the use of a partnership or business name may be continued" where the business continued to be conducted by any of the partners, their assignees or appointees, and that, therefore, the respondent was within his rights. But the penal code of the state provided that: "No person or persons shall hereafter carry on or conduct or transact business in this state under any assumed name or under any designation, name or style, corporate or otherwise, other than the real name or names of the individual or individuals conducting or transacting such business, unless such person or persons shall file in the office of the clerk of the county or counties in which such person or persons conduct, or transact, or intend to conduct or transact such business, a certificate setting forth the name under which such business is, or is to be, conducted or transacted, and the true or real full name or names of the person or persons conducting or transacting the same, with the post-office address or addresses of said person or persons." In disapproving the respondent's contention, the court said: "It is quite true that the profession of the law is not regarded as a business in a commercial sense, but

the organizing of a firm or copartnership and the selecting of a firm name, the practice of the profession thereunder and the establishing of a reputation and all that pertains thereto gives it the character of business, and it may be that these statutes apply to copartnerships among attorneys in so far as is consistent with their duties to their clients and to the courts under their oaths of office and the provisions of the code with reference to the practice of the profession in their own name or that of a copartnership to which they belong; . . . and, therefore, when the defendant undertook to file a certificate under the provisions of the penal code, selecting a name under which he proposed to carry on the practice of the law, he could not thereby evade or nullify the provisions of that section, nor could he nullify the order of the court, by arranging to do for Hummel in his name that which the court has prohibited him from doing himself. The defendant has not shown himself to be a partner, an assignee or an appointee of the firm of Howe & Hummel, within the requirements of the partnership law, and he is not now in a position in which he can acquire such a right." In re Kaffenburgh, 188 N. Y. 49, 80 N. E. 570, *affirming* 115 App. Div. 346, 101 N. Y. S. 507. See also New York Penal Law, § 277; In re Rothschild, 140 App. Div. 583, 125 N. Y. S. 629.

by a collection association which sends out claims under his name with his knowledge and consent.<sup>19</sup>

*Conduct Contrary to Public Policy.*

§ 843. **Unlawful Contracts.**— The right of an attorney to enter into contracts for compensation with his client is, in this country, beyond question; <sup>20</sup> but it is essential that such contracts should be fair and honest.<sup>1</sup> It has also been shown, heretofore, that certain contracts are void or voidable, on grounds of public policy,<sup>2</sup> and this is particularly true of contracts which disclose champerty, barratry, or maintenance.<sup>3</sup> In some instances these latter contracts, especially where they provide that an attorney is to pay the costs and expenses of litigation,<sup>4</sup> or where they consist of the purchase of litigious rights,<sup>5</sup> are deemed not only to be unlawful as a matter of general and statute law, but are also made penal offenses; and, therefore, an attorney who enters into such a contract is guilty of flagrant professional misconduct for which he may be disbarred.<sup>6</sup> So, where an attorney entered into a conspiracy, with a judge and his former client, to extort money from another by threatening a prosecution for the alienation of the affection of such client's husband, and obtained a large sum of money in pursuance of such conspiracy, which was divided between the parties, the attorney will be disbarred.<sup>7</sup> But the fact that an attorney enters into an inequitable contract with his client will not, of itself, constitute ground for disbarment; <sup>8</sup> in-

<sup>19</sup> *In re Hutson*, 127 App. Div. 492, 111 N. Y. S. 731.

<sup>20</sup> See *supra*, § 417.

<sup>1</sup> See *supra*, §§ 428-432.

<sup>2</sup> See *supra*, §§ 433-438.

<sup>3</sup> See *supra*, §§ 379-399.

<sup>4</sup> See *supra*, § 389.

<sup>5</sup> See *supra*, §§ 395-397.

<sup>6</sup> *United States*.—See *Bunel v. O'Day*, 125 Fed. 303.

*Alabama*.—*State v. Quarles*, 158 Ala. 54, 48 So. 499.

*New York*.—*In re Bleakly*, 5 Paige 311; *In re Klatzkie*, 142 App. Div. 352, 126 N. Y. S. 842.

*Pennsylvania*.—*Maires's Appeal*, 189 Pa. St. 99, 41 Atl. 988, 43 W. N. C. 311.

*Utah*.—*In re Evans*, 22 Utah 366, 62 Pac. 913, 83 Am. St. Rep. 794, 53 L.R.A. 952.

*Washington*.—*State v. Martin*, 45 Wash. 76, 87 Pac. 1054; *State v. Rossman*, 53 Wash. 1, 17 Ann. Cas. 625, 101 Pac. 357, 21 L.R.A.(N.S.) 821. And see the two sections following.

<sup>7</sup> *In re Burke*, 9 Ohio Cir. Dec. 350, 17 Ohio Cir. Ct. 315.

<sup>8</sup> *In re Jones*, 29 Utah 333, 81 Pac. 162.

deed, there may be a recovery on a *quantum meruit* for services rendered in pursuance of contracts of this character, even though they might have been avoided on grounds of public policy.<sup>9</sup> Nor will an attorney be disbarred, it seems, merely because he refused to consent to the appointment of a receiver for a railroad unless such proposed receiver would secretly promise to make the attorney the general manager of such railroad, at least in the absence of proof that the attorney was unfitted for the position sought by him.<sup>10</sup> Neither is the lending of money at a usurious rate of interest sufficient ground for disbarring an attorney, in absence of circumstance of hardship or oppression.<sup>11</sup>

§ 844. **Solicitation of Business Generally.** — While a mere effort to procure employment in an honorable way, and for legitimate purposes, is not a sufficient ground for disbarment, and may not even be censurable,<sup>12</sup> it is evident that conduct of this character may be carried to an extent where it will not only deserve censure, but also disbarment; thus, an attorney has been disbarred where he solicited business by a letter in which he used the following language: "If you go to trial without me in your case, I will bet you, you hang—will bet you the best suit of clothes made. You had better get busy."<sup>13</sup> It has also been held that a lawyer may be disbarred where it appears that he employs "runners" to hunt up prospective litigants, and to induce them to come to the lawyer's office and employ him.<sup>14</sup> Statutes in some states have declared this rule.<sup>15</sup>

<sup>9</sup> See *supra*, § 438.

<sup>10</sup> *Ex p. Cole*, 1 McCrary, 405, 6 Fed. Cas. No. 2,973.

<sup>11</sup> *People v. Wheeler*, 259 Ill. 99, 102 N. E. 188.

<sup>12</sup> See *Vocke v. Peters*, 58 Ill. App. 338.

<sup>13</sup> *In re Hittson*, 15 N. M. 6, 99 Pac. 689. See also *In re Aldrich*, (Vt.) 86 Atl. 801.

Solicitation of business as a defense to actions for compensation has been considered *supra*, § 562.

<sup>14</sup> *Appeal of Maires*, 189 Pa. St.

99, 41 Atl. 988, 43 W. N. C. 311. See also *Meguire v. Corwine*, 101 U. S. 108, 25 U. S. (L. ed.) 899; *Alpers v. Hunt*, 86 Cal. 78, 24 Pac. 846, 21 Am. St. Rep. 17, 9 L.R.A. 483; *In re Welch*, 156 App. Div. 470, 141 N. Y. S. 381; *Ingersoll v. Coal Creek Coal Co.*, 117 Tenn. 263, 10 Ann. Cas. 829, 98 S. W. 178, 119 Am. St. Rep. 1003, 9 L.R.A.(N.S.) 282. And see the preceding section, and also the one following.

<sup>15</sup> *New York Penal Law*, § 274, provides that an attorney must be re-

§ 845. **Solicitation by Advertisement.** — The solicitation of legal business by attorneys by advertising therefor in public newspapers, other than by the insertion of a mere card showing the address of an attorney, has been condemned, and where such advertisement is for improper purposes, or false, deceptive, or misleading, it is misconduct for which disbarment is a proper punishment. Thus, where an attorney, under the disguise of carrying on a real estate business, manipulates a scheme to defraud the general public by advertisements inserted in the public press, he will be disbarred.<sup>16</sup> A most reprehensible feature of the solicitation of business by attorneys is to be found in those advertisements which solicit clients to bring divorce suits; such advertising is prohibited in some states by statute, and also made a ground for disbarment; and it would seem that a like result would follow from the insertion of such advertisements irrespective of statutory

moved from office if he shall "by himself, or by or in the name of another person, either before or after action brought, promise or give, or procure to be promised or given, a valuable consideration to any person, as an inducement to placing, or in consideration of having placed, in his hands, or in the hands of another person, a demand of any kind, for the purpose of bringing an action thereon, or of representing the claimant in the pursuit of any civil remedy for the recovery thereof. But this subdivision does not apply to an agreement between attorneys and counselors, or either, to divide between themselves the compensation to be received." See *Irwin v. Curie*, 171 N. Y. 409, 64 N. E. 161, 58 L.R.A. 830, *reversing* 56 App. Div. 514, 67 N. Y. S. 380; *Hirshbach v. Ketchum*, 5 App. Div. 324, 39 N. Y. S. 291; *Matter of Hirshbach*, 72 App. Div. 79, 76 N. Y. S. 117; *Hirshbach v. Ketchum*, 79 App. Div. 561, 80 N. Y. S. 143; *Hirschbach v. Ketchum*, 84 App. Div. 258, 82 N. Y. S. 739, *affirm-*

*ing* 40 Misc. 306, 81 N. Y. S. 957; *Matter of Clark*, 108 App. Div. 150, 95 N. Y. S. 388, *affirmed* 184 N. Y. 222, 77 N. E. 1, petition for reinstatement denied 128 App. Div. 348, 112 N. Y. S. 777; *Matter of Shay*, 133 App. Div. 547, 118 N. Y. S. 146, *affirmed* 196 N. Y. 530, 89 N. E. 1112.

A Washington statute provides that any attorney who seeks or obtains employment to prosecute or defend in any suit or case at law or in equity by means of personal solicitation of such employment for him, or who, by himself or another, seeks or obtains such employment by giving to the person from whom the employment is sought, money or any other thing of value, shall be deemed guilty of barratry, and shall be disbarred, in addition to other penalties prescribed thereby. *State v. Rossman*, 53 Wash. 1, 17 Am. Cas. 625, 101 Pac. 357, 21 L.R.A.(N.S.) 821.

<sup>16</sup> In *re Wilson*, 79 Kan. 450, 100 Pac. 75. And see the preceding section.

authority therefor,<sup>17</sup> the courts not being confined, as a general rule at least, to the statutory grounds for disbarment.<sup>18</sup> Thus, an advertisement reading, "Loyal, wealthy attorney guarantees family freedom in a month; no advance costs; witnesses quietly volunteered," has been held to be a sufficient ground for disbarment.<sup>19</sup> In another case where an advertisement read, "Divorces legally obtained for incompatibility, etc. Residence unnecessary. Fee after decree. Address P. O. box 1037, Chicago, Ill.," the court, in entering the order of disbarment, said: "Such shameless effrontery has never before, to our knowledge, been manifested by any member of this or any other bar, and it should stigmatize their author with enduring shame and contumely. These advertisements are not only a libel upon the courts of justice of this state, but are false in themselves, and put forth to the public by one who would not place his name to them. No high-minded, honorable member of our noble profession, in this or in any other state, so demeans himself, nor does any member of it, jealous of his own honor, and duly appreciating his relations to the profession and to the courts, so conduct" himself.<sup>20</sup> In the case of a first delinquency of the character under consideration, the fact that the advertisement was discontinued upon the complaint of the bar association may be considered by the court in mitigation of punishment.<sup>1</sup>

### *Misconduct as Official.*

§ 846. **Misconduct as Judge.** — It has been held that one may be disbarred as an attorney even though, when the proceedings were instituted, he was a judge of a court of record: thus, a judge may be disbarred where he undertakes to exercise the duties of his office clearly contrary to statute, and to further his desires and purposes as an attorney, and not as a judge.<sup>2</sup> So, a justice

<sup>17</sup> *People v. MacCabe*, 18 Colo. 186, 32 Pac. 280, 36 Am. St. Rep. 270, 19 L.R.A. 231; *People v. Taylor*, 32 Colo. 250, 75 Pac. 914; *People v. Propper*, 220 Ill. 455, 77 N. E. 208; *In re Schnitzer*, 33 Nev. 581, 112 Pac. 848, 33 L.R.A.(N.S.) 911; *Reno Bar Ass'n v. Secular*, 34 Nev. 313, 123 Pac. 13.

<sup>18</sup> See *supra*, § 759.

<sup>19</sup> *People v. Smith*, 200 Ill. 442, 66 N. E. 27, 93 Am. St. Rep. 206.

<sup>20</sup> *People v. Goodrich*, 79 Ill. 148.

<sup>1</sup> *In re Schnitzer*, 33 Nev. 581, 112 Pac. 848, 33 L.R.A.(N.S.) 911.

<sup>2</sup> *In re Breen*, 36 Nev. 164, 93 Pac. 997, 17 L.R.A.(N.S.) 572; *In re*



of the peace has been disbarred for misconduct in the performance of his judicial duties.<sup>3</sup> But where a candidate for the office of judge gave a written promise of appointment to a friend to be handed to an office-seeker in the event of the candidate's election, the friend being charged to accept no money therefor, and such money was accepted under the belief that the said office-seeker would injure the candidate, but was returned after the election, it was held that the transaction did not warrant the candidate's disbarment.<sup>4</sup> On the other hand, it has been held that a judge may not be disbarred because of the fact that he practiced law, contrary to statute, while occupying his judicial position,<sup>5</sup> because the offense was that of a judge and not of an attorney.<sup>6</sup>

**§ 847. Misconduct as District Attorney.**— So, the court may suspend or disbar an attorney for misconduct in connection with his duties as a prosecuting officer,<sup>7</sup> and this is true although he is also subject to impeachment by the state.<sup>8</sup> Thus, a prosecuting attorney may be disbarred for gross infidelity to his trust.<sup>9</sup> So, the refusal or neglect of a district attorney to prosecute persons charged with the commission of a crime, will justify his disbarment.<sup>10</sup> And where a prosecuting officer receives sums of money as a consideration for refraining from enforcing the penal laws of the state, he will be disbarred.<sup>11</sup> So, in some jurisdictions, disbarment may be justified where it appears that the partner of a prosecuting officer defended criminals in the interest of the

Dellenbaugh, 9 Ohio Cir. Dec. 325, 17 Ohio Cir. Ct. 106. See also *In re Dellenbaugh*, 9 Ohio Cir. Dec. 380, 17 Ohio Cir. Ct. 302; *State v. Martin*, 45 Wash. 76, 87 Pac. 1054.

<sup>3</sup> *In re Hobbs*, 75 N. H. 285, 73 Atl. 303.

<sup>4</sup> *People v. Goddard*, 11 Colo. 259, 18 Pac. 338.

<sup>5</sup> *Baird v. Justice's Court*, 11 Cal. App. 439, 105 Pac. 259; *In re Silkman*, 88 App. Div. 102, 84 N. Y. S. 1025. And see also *supra*, § 71.

<sup>6</sup> *Baird v. Justice's Court*, 11 Cal. App. 439, 105 Pac. 259.

<sup>7</sup> *In re Norris*, 60 Kan. 649, 57 Pac. 528; *In re Jones*, 70 Vt. 71, 39 Atl. 1087.

<sup>8</sup> *In re Jones*, 70 Vt. 71, 39 Atl. 1087.

<sup>9</sup> *In re Jones*, 70 Vt. 71, 39 Atl. 1087; *State v. Hays*, 64 W. Va. 45, 61 S. E. 355.

<sup>10</sup> *In re Voss*, 11 N. D. 540, 90 N. W. 15.

<sup>11</sup> *People v. Anglim*, 33 Colo. 40, 78 Pac. 687; *In re Simpson*, 9 N. D. 379, 83 N. W. 541.

firm; but the fact that the district attorney occupies the same office with another attorney, and is associated with him in civil business, and that such other attorney has been retained to defend persons accused of crime in the courts wherein the district attorney officiates, does not justify the disbarment of the latter.<sup>12</sup> Misconduct which will justify disbarment of a district attorney, it has been said, is such as shows him to be unworthy of the public confidence, and unfit to be trusted with professional duties.<sup>13</sup> And in one case disbarment was ordered for a crime wholly disconnected with professional duty.<sup>14</sup> A district attorney will not be disbarred merely because he has undertaken to conduct a civil case in the interest of the prosecuting witness in a criminal case based on the same state of facts;<sup>15</sup> and this is especially true where, prior to trial or judgment in the civil case, he withdraws therefrom.<sup>16</sup>

§ 848. **Misconduct as Notary Public.** — There seems to be no question as to the right of the court to disbar an attorney who, as a notary public, has been guilty of misconduct;<sup>17</sup> such as falsely certifying<sup>18</sup> or antedating<sup>19</sup> an affidavit. In another case, however, where an attorney, as a notary, falsely certified that certain persons appeared before him, when in fact they did not do so, and it further appeared that there was no motive or intention to do wrong, or to injure any one, on the part of the attorney, it was held that he was guilty of an offense which would warrant his disbarment, and was severely censured therefor, but,

<sup>12</sup> *In re Disbarment of Lyons*, 162 Mo. App. 688, 145 S. W. 844. And see also *supra*, § 71.

<sup>13</sup> *State v. Hays*, 64 W. Va. 45, 61 S. E. 355. See also *In re Disbarment of Lyons*, 162 Mo. App. 688, 145 S. W. 844.

<sup>14</sup> *Unlawful sale of liquor. Underwood v. Com.*, 105 S. W. 151, 32 Ky. L. Rep. 32.

<sup>15</sup> *In re Johnson*, 27 S. D. 386, 131 N. W. 453. See also *In re Disbarment of Lyons*, 162 Mo. App. 688, 145 S. W. 844.

<sup>16</sup> *In re Johnson*, 27 S. D. 386, 131 N. W. 453.

<sup>17</sup> See *People v. Hahn*, 197 Ill. 137, 64 N. E. 342; *New York Bar Assoc. v. Chappell*, 131 App. Div. 69, 115 N. Y. S. 868.

<sup>18</sup> *State v. Finn*, 32 Ore. 519, 52 Pac. 756, 67 Am. St. Rep. 550; *In re Hopkins*, 51 Wash. 569, 103 Pac. 805.

<sup>19</sup> *In re Aretander*, 26 Minn. 25, 1 N. W. 43.

because of the mitigating circumstances, he was not further disciplined.<sup>20</sup> To the objection that notarial misconduct was outside the scope of the attorney's professional relations,<sup>1</sup> the court in one case said tersely: "What the respondent did as notary public he as attorney at law procured himself to do. As respects the point that this procurement was in his professional capacity, the case in principle is in no respect different from what it would have been if he had procured some other notary public to do what he procured himself to do."<sup>2</sup>

*Misconduct outside Scope of Professional Relations.*

§ 849. **Generally.** — The power of the court to disbar an attorney is not limited to those cases or instances of misconduct wherein he has been employed, or has acted, in a professional capacity;<sup>3</sup> but, on the contrary, this power may be exercised where an attorney's misconduct, outside the scope of his professional relations, shows him to be an unfit person to practice law.<sup>4</sup> Thus,

<sup>20</sup> In re Barnard, 151 App. Div. 580, 136 N. Y. S. 185.

<sup>1</sup> See also *infra*, §§ 849-852.

<sup>2</sup> In re Aretander, 26 Minn. 25. 1 N. W. 43.

<sup>3</sup> Re Blake, 3 El. & El. 34, 107 E. C. L. 34; Re Hill, L. R. 3 Q. B. (Eng.) 543 (where the accused attorney was acting as clerk for a firm of attorneys); In re Radford, 168 Mich. 474, 134 N. W. 472. See also Ex p. Steinman, 95 Pa. St. 220, 40 Am. Rep. 637, reversing 8 W. N. C. 296, and cases in the following notes.

<sup>4</sup> In re Haymond, 121 Cal. 385, 53 Pac. 899; In re Radford, 168 Mich. 474, 134 N. W. 472; In re Percy, 36 N. Y. 651; In re Alexander, 137 App. Div. 770, 122 N. Y. S. 479; In re Heymann, 156 App. Div. 73, 140 N. Y. S. 1065; State v. McClaugherty, 33 W. Va. 250, 10 S. E. 407.

In *New York* it was once held that an attorney could not be disbarred for

a non-indictable offense committed in his private capacity. *State Bank v. Stryker*, 1 Wheel. Crim. 330 (drawing two checks upon banks where he had no account, one of the checks being paid by the bank upon which it was drawn). It was also held that an attorney could not be disciplined for misconduct in his private capacity as a party to an action, because the law prescribed other and different punishments for his acts and because he had already been punished for contempt and he could not be punished again for the same offense. In re Post, 4 Silvermail, 248, 7 N. Y. S. 438. But the latter decision disregards the settled rules that disbarment is not intended as punishment, and that an attorney may be disbarred upon his conviction of a crime (see *infra*, §§ 763, 856 et seq.), or for contempt (see *infra*, § 792); and even before that decision the court of

where an attorney, while acting as an executor, neglected to file his account in accordance with an order of the probate court, and sought to deceive the court, and defraud persons interested in the estate, his conduct constitutes a sufficient ground for his disbarment.<sup>5</sup> It has also been held that untrue statements made by an attorney, without probable cause, in a public speech, charging others with burning specific property, must be weighed by the court in determining whether he should be disbarred, especially when coupled with other misconduct.<sup>6</sup> So, an attorney may be disbarred for the commission of crime, even though such crime is not connected with his professional duties, or the performance thereof.<sup>7</sup> In cases of this character, however, it must appear that the misconduct charged against the attorney is of such a nature as to evince a lack of those qualities which are essential qualifications of an attorney.<sup>8</sup>

appeals had expressly overruled the contention that general bad character or misconduct outside of a professional relation was not ground for disbarment (*Percy's Case*, 36 N. Y. 651, 653, 654); and that court later sustained the disbarment of an attorney for misconduct as a party plaintiff in an action, although it would seem that his acts were criminal. *Ryan v. Opdyke*, 143 N. Y. 528, 38 N. E. 963. Still later the appellate division disbarred an attorney for misappropriating the proceeds of checks entrusted to him for collection, though his act was clearly criminal, and the money was apparently received by him otherwise than in his professional capacity. *New York Bar Assoc. v. Chappell*, 131 App. Div. 69, 115 N. Y. S. 868. In a subsequent case the same court said: "Attorneys who are guilty of fraud and deceit in their relations with others, even in their private transactions, should not be allowed to escape discipline when the utmost good faith and highest degree of hon-

esty is required from members of the profession." *Matter of Alexander*, 137 App. Div. 770, 122 N. Y. S. 479. See also *Matter of Langslow*, 167 N. Y. 314, 320, 60 N. E. 590. Under a recent statute (*Laws of 1912*, ch. 253, amending judiciary law, § 88), the power of the court to discipline an attorney who has been guilty of "professional misconduct, malpractice, fraud, deceit, crime or misdemeanor, or of any conduct prejudicial to the administration of justice," may be exercised whether in the performance of the act he was acting as attorney for himself or for another. *Matter of Heymann*, 156 App. Div. 73, 140 N. Y. S. 1065.

<sup>5</sup> *In re Radford*, 168 Mich. 474, 134 N. W. 472.

<sup>6</sup> *In re Evans*, 94 S. C. 414, 78 S. E. 277.

<sup>7</sup> See *infra*, § 854.

<sup>8</sup> *Ex p. Wall*, 107 U. S. 306, 2 S. Ct. 569, 27 U. S. (L. ed.) 552; *People v. Humbert*, 51 Colo. 60, 117 Pac. 139; *Underwood v. Com.* 105 S. W. 151, 32

Merely discreditable acts, if not infamous and not connected with an attorney's duties, will not give the court jurisdiction to strike him from the roll.<sup>9</sup> Since it is presumed that, upon the admission of an attorney to the bar, the court inquired into his character, charges of misconduct in transactions occurring before he was admitted to the bar should not be considered in proceedings for his disbarment,<sup>10</sup> though if such misconduct is so serious that, if it had been disclosed, it would have prevented his admission, it may constitute grounds for his disbarment.<sup>11</sup>

§ 850. *Moral Delinquency.* — As proof of a good moral character is an indispensable requisite for admission to the bar,<sup>12</sup> the continued possession thereof is equally essential,<sup>13</sup> and an attorney may be disbarred for misconduct, professional or nonprofessional,<sup>14</sup> which shows that he has forfeited his claim thereto.<sup>15</sup> But, in order to warrant the revocation of an attorney's license

Ky. L. Rep. 32; *In re Post*, 54 Hun 634 mem., 7 N. Y. S. 438; *State v. Byrnett*, 4 Ohio Dec. 89; *Ex p. Steinman*, 95 Pa. St. 220, 40 Am. Rep. 637, *reversing* 8 W. N. C. 296.

<sup>9</sup> *In re Dickens*, 67 Pa. St. 169, 5 Am. Rep. 420; *State v. McClaugherty*, 33 W. Va. 250, 10 S. E. 407.

An accusation which charges an attorney with having accepted payment to procure a confession from one accused of murder, while his trial was pending, for publication in a newspaper, with the understanding that such confession would be attested by the judge and the district attorney, which scheme, however, was not carried out, is not ground for disbarment, the attorney not having been counsel for the prisoner. *In re Haymond*, 121 Cal. 385, 53 Pac. 899.

An attorney who is also the editor of a newspaper cannot be disbarred for a misrepresentation of facts, appearing in his newspaper, and connected with the trial of a cause in the court

in which he practices. *In re Greevy*, 4 W. N. C. (Pa.) 308.

<sup>10</sup> *In re Evans*, 94 S. C. 414, 78 S. E. 277.

<sup>11</sup> *In re Platz*, (Utah) 132 Pac. 390; *Dormenon's Case*, 1 Mart. O. S. (La.) 129, in which case the fact that an attorney before his admission had been engaged in aiding and heading a murderous insurrection of slaves, was held to be a sufficient ground for striking his name from the roll.

And see *In re Elliott*, 18 S. D. 264, 100 N. W. 431. See §§ 839, 840.

<sup>12</sup> See *supra*, § 34.

<sup>13</sup> *Underwood v. Com.*, 105 S. W. 151, 32 Ky. L. Rep. 32, and cases in the following notes.

<sup>14</sup> *Bar Ass'n of Boston v. Greenhood*, 168 Mass. 169, 46 N. E. 568; *In re Radford*, 168 Mich. 474, 134 N. W. 472.

<sup>15</sup> *In re Wall*, 13 Fed. 814; *In re Boone*, 83 Fed. 944; *State v. Mosher*, 128 Ia. 82, 5 Ann. Cas. 984, 103 N. W. 105; *State v. Rohrig*, (Ia.) 139 N. W.

for want of a good moral character, his moral delinquencies must be such as to unfit him for the proper discharge of the trust reposed in him; thus, it must appear that he is lacking in common honesty,<sup>16</sup> or veracity.<sup>17</sup> It is not necessary, however, that the attorney should have been guilty of a contempt, or a crime;<sup>18</sup> but it will be sufficient if he has been guilty of unprofessional conduct involving moral turpitude,<sup>19</sup> and this is especially true where he has manifested no regret therefor.<sup>20</sup> "There is no class of men among whom moral delinquency is more marked and disgraceful than among lawyers. Among merchants, so many honest men become involved through misfortune that the rogue may hope to take shelter in the crowd and be screened from observation. Not so the lawyer. If he continues to seek business, he must find his employment in lower and still lower grades; and will soon come to verify and illustrate the remark of Lord Bolingbroke that, 'the profession of the law, in its nature the noblest and most beneficial to mankind, is in its abuse and abasement the most sordid and pernicious.' " <sup>1</sup>

§ 851. **Extent of Rule as to Moral Delinquency.** — To warrant the removal of an attorney for moral delinquency, it must appear that he is unfit and unsafe to be trusted with the duties

908; *In re Smith*, 73 Kan. 743, 85 Pac. 584; *Bar Ass'n of Boston v. Greenhood*, 168 Mass. 169, 46 N. E. 568; *In re Percy*, 36 N. Y. 651.

<sup>16</sup> See the two sections following.

<sup>17</sup> *State v. Mosher*, 128 Ia. 82, 5 Ann. Cas. 984, 103 N. W. 105; *State v. Byrket*, 4 Ohio Dec. 89.

It would be monstrous to say that one whose character for truth and veracity is so utterly gone that no one would believe him on oath, should remain an officer of a court of record, having special access to its files and records, and great facilities for deceiving the court and obstructing the administration of justice. *State v.*

*Laughlin*, 10 Mo. App. 1. See also *In re Percy*, 36 N. Y. 651.

<sup>18</sup> *Baker v. Com.*, 10 Bush (Ky.) 592; *State v. Root*, 5 N. D. 487, 67 N. W. 590, 57 Am. St. Rep. 568; *In re Thatcher*, 80 Ohio St. 492, 89 N. E. 39.

<sup>19</sup> *In re Radford*, 168 Mich. 474, 134 N. W. 472; *In re Percy*, 36 N. Y. 651; *In re Marsh*, (Utah) 129 Pac. 411.

<sup>20</sup> *In re Radford*, 168 Mich. 474, 134 N. W. 472.

<sup>1</sup> *In re Radford*, 168 Mich. 474, 134 N. W. 472, *quoting* from Sharswood's *Essay on Professional Ethics*, pp. 170, 171. See also *Law Lectures by Sharswood*, pp. 29, 30.

and responsibilities of the legal profession.<sup>2</sup> And it has been said that an attorney may be so unfitted by a series of unprofessional acts which show him to be unworthy of the confidence of the members of the bar, and which are disgraceful to himself as a man.<sup>3</sup> But "it is not for every moral offense which may leave a stain upon character that courts can summon an attorney to account. Many persons, eminent at the bar, have been chargeable with moral delinquencies which were justly a cause of reproach to them; some have been frequenters of the gaming table, some have been dissolute in their habits, some have been indifferent to their pecuniary obligations, some have wasted estates in riotous living, some have been engaged in broils and quarrels disturbing the public peace; but for none of these things could the court interfere and summon an attorney to answer, and if his conduct should not be satisfactorily explained, proceed to disbar him. It is only for that moral delinquency which consists in a want of integrity and trustworthiness, and renders him an unsafe person to manage the legal business of others, that the courts can interfere and summon him before them."<sup>4</sup> "What is a good moral character?" asks the court in another case. "If judges would permit themselves to go into the vast domain of morals and require lawyers, practicing in their courts, to conform to their ideas of the standard of morals necessary to be maintained by attorneys at law, what man would be safe from the annoyance or possible disgrace of disbarment proceedings? The drinking of intoxicating liquors, the playing of games of chance, betting on horse races or elections, the use of profane language, and many other vices are deemed moral or immoral, as they conform to or fall short of the standard of morals adopted by individuals. By what standard is the moral character of an attorney to be judged? Is it to be at the mercy of the whims and prejudices of the courts of this state, who can travel at will through the field of morals in passing judgment upon their fellow-men? Certainly no such condition was ever contem-

<sup>2</sup> *State v. Mosher*, 128 Ia. 82, 5 Ann. Cas. 984, 103 N. W. 105; *Baker v. Com.*, 10 Bush (Ky.) 592; *State v. McClaugherty*, 33 W. Va. 250, 10 S. E. 407.

<sup>3</sup> *Dickens's Case*, 67 Pa. St. 169, 5 Am. Rep. 420.

<sup>4</sup> *Ex p. Wall*, 107 U. S. 306, 2 S. Ct. 569, 27 U. S. (L. ed.) 552.

plated. In the opinion of the court, the 'good moral character' required to be possessed by an attorney at law has relation only to his character for integrity and honesty; it embraces only those moral traits of integrity and honesty which fit him to transact faithfully and honestly the business of an attorney at law."<sup>5</sup> It would be carrying the doctrine too far to hold that an attorney must be free from every vice, and to strike him from the roll of attorneys because he may indulge in irregularities affecting to some extent his moral character, but not affecting his personal or professional integrity.<sup>6</sup>

**§ 852. Dishonesty.**—It is generally conceded, where moral delinquency is recognized as a ground for disbarment, that the want of common honesty in an attorney constitutes such a delinquency.<sup>7</sup> Thus, where an attorney receives money under an employment in a business transaction, and not professionally, his wrongful detention thereof constitutes a sufficient ground for his disbarment.<sup>8</sup> So, an attorney may be disbarred where he receives money in his official capacity, for a certain purpose, with the intention of converting the same to his own use, and thereby frustrating the purpose of the payer.<sup>9</sup>

### *Criminal Misconduct.*

**§ 853. Generally.**—While the commission of crime will, as a rule, afford sufficient ground for the disbarment of an attorney,<sup>10</sup>

<sup>5</sup> *State v. Byrnett*, 4 Ohio Dec. 89. And see to the same effect Dickens's Case, 67 Pa. St. 169, 5 Am. Rep. 420.

<sup>6</sup> *State v. McClaugherty*, 33 W. Va. 250, 10 S. E. 407.

<sup>7</sup> *Illinois*.—*People v. Salomon*, 184 Ill. 490, 56 N. E. 815.

*Iowa*.—*State v. Mosher*, 128 Ia. 82, 5 Ann. Cas. 984, 103 N. W. 105.

*Michigan*.—*In re Radford*, 168 Mich. 474, 131 N. W. 472.

*New Hampshire*.—*In re Delano*, 58 N. H. 5, 42 Am. Rep. 555; *In re Hobbs*, 75 N. H. 285, 73 Atl. 303; *In re Allen*, 75 N. H. 301, 73 Atl. 804;

*In re Moore*, 76 N. H. 227, 81 Atl. 703.

*New York*.—*In re Titus*, 66 Hun 632 mem., 21 N. Y. S. 724; *New York Bar Assoc. v. Chappell*, 131 App. Div. 69, 115 N. Y. S. 868; *In re Pascal*, 146 App. Div. 836, 131 N. Y. S. 823.

*Ohio*.—*State v. Byrnett*, 4 Ohio Dec. 89.

<sup>8</sup> *In re Wilson*, 79 Kan. 674, 17 Ann. Cas. 690, 160 Pac. 635, 21 L.R.A. (N.S.) 517; *New York Bar Assoc. v. Chappell*, 131 App. Div. 69, 115 N. Y. S. 868.

<sup>9</sup> *In re Orwig*, 31 Leg. Int. (Pa.) 20.

<sup>10</sup> See *infra*, §§ 854-864.



especially when there has been a conviction thereof,<sup>11</sup> it is not necessary that crime should be committed in order to warrant the revocation of a license to practice law; <sup>12</sup> indeed, disbarment may be ordered for misconduct for which an attorney is not subject even to a civil liability.<sup>13</sup> Nor, on the other hand, will disbarment proceedings be prevented because of the fact that one guilty of crime is also subject to punishment for his violation of the penal laws,<sup>14</sup> for the purpose of disbarment proceedings is to rid the bar of an unworthy member, not to punish him.<sup>15</sup>

### § 854. Nature of Crime Warranting Disbarment. —

In most jurisdictions the fact that an attorney has committed a crime, the nature of which is inconsistent with a continuance of that good moral character which is required on admission to the bar, will constitute a sufficient ground for disbarment,<sup>16</sup> and this is especially true where there has been a trial and conviction.<sup>17</sup> Thus, an attorney may be disbarred for any infamous crime,<sup>18</sup> as, for instance, perjury or subornation of perjury,<sup>19</sup> forgery,<sup>20</sup> larceny,<sup>1</sup>

<sup>11</sup> See *infra*, § 860.

<sup>12</sup> In *re* Wall, 13 Fed. 814; In *re* Boone, 83 Fed. 944; In *re* Hardenbrook, 135 App. Div. 634, 121 N. Y. S. 250, *affirmed* 199 N. Y. 539, 92 N. E. 1086; In *re* Thatcher, 80 Ohio St. 492, 89 N. E. 39.

<sup>13</sup> In *re* Boone, 83 Fed. 944.

<sup>14</sup> In *re* Danford, 157 Cal. 425, 108 Pac. 322.

<sup>15</sup> See *supra*, §§ 760, 761.

<sup>16</sup> Ex p. Cole, 1 McCrary 405, 6 Fed. Cas. No. 2,973; Ex p. Steinman, 95 Pa. St. 220, 40 Am. Rep. 637, *reversing* 8 W. N. C. 296 dictum; In *re* Hirst, 1 W. N. C. (Pa.) 18; In *re* Elliott, 18 S. D. 264, 100 N. W. 431.

<sup>17</sup> See *infra*, § 860.

<sup>18</sup> State Bank v. Stryker, 1 Wheel. Crim. (N. Y.) 330.

<sup>19</sup> People v. Brown, 218 Ill. 301, 75 N. E. 907; In *re* Lamb, 105 App. Div. 462, 94 N. Y. S. 331; In *re* Joseph, Attys. at L. Vol. II.—80.

135 App. Div. 589, 120 N. Y. S. 793; State v. Holding, 1 McCord L. (S. C.) 379. And see also *supra*, §§ 818–827.

<sup>20</sup> *Colorado*.—People v. Walkey, 26 Colo. 483, 58 Pac. 591.

*Indiana*.—Ex p. Walls, 64 Ind. 461.

*Kentucky*.—Nelson v. Com., 128 Ky. 779, 109 S. W. 337, 16 L.R.A.(N.S.) 272, 33 Ky. L. Rep. 143.

*Montana*.—In *re* Thresher, 33 Mont. 441, 8 Ann. Cas. 845, 84 Pac. 876, 114 Am. St. Rep. 834.

*New York*.—In *re* Rosenthal, 137 App. Div. 772, 122 N. Y. S. 471; In *re* Pascal, 146 App. Div. 836, 131 N. Y. S. 823.

*Oregon*.—Ex p. Kindt, 32 Ore. 474, 52 Pac. 187.

<sup>1</sup> People v. Manns, 28 Colo. 83, 62 Pac. 840; People v. Schintz, 181 Ill. 574, 54 N. E. 1011; In *re* Kenney, 155 App. Div. 890, 140 N. Y. S. 314.

conspiracy,<sup>2</sup> or embezzlement.<sup>3</sup> So, disbarment may be ordered as against an attorney who participates in a lynching,<sup>4</sup> massacre,<sup>5</sup> riot,<sup>6</sup> or duel;<sup>7</sup> or who aids in the escape of a convict.<sup>8</sup> And disbarment has been ordered, in some instances, for a violation of the provisions of the bankruptcy law,<sup>9</sup> false pretenses,<sup>10</sup> bribery,<sup>11</sup> keeping a bawdy house,<sup>12</sup> the unlawful sale of intoxicating liquor,<sup>13</sup> and other misdemeanors.<sup>14</sup> Even nonindictable offenses may constitute ground for disbarment.<sup>15</sup> Nor is it material whether a criminal offense which is alleged as a ground for disbarment, was committed in connection with matters in which the attorney was acting in a professional capacity, or not.<sup>16</sup>

§ 855. **Blackmail.** — An attorney should not abuse either his authority or the process of the court,<sup>17</sup> and where, whether in his client's affairs or his own, he is guilty of blackmail, or an attempt to blackmail, he will be disbarred.<sup>18</sup> Thus where an attorney, who

<sup>2</sup> *In re Burke*, 9 Ohio Cir. Dec. 350, 17 Ohio Cir. Ct. 315.

<sup>3</sup> *In re Thresher*, 33 Mont. 441, 8 Ann. Cas. 845, 84 Pac. 876, 114 Am. St. Rep. 834; *In re Simpson*, 9 N. D. 379, 83 N. W. 541. And see also *supra*, §§ 804-806.

<sup>4</sup> *Ex p. Wall*, 107 U. S. 265, 2 S. Ct. 569, 27 U. S. (L. ed.) 552, 27 Alb. L. J. 406, 5 Ky. L. Rep. 2, *affirming* 13 Fed. 814, 27 Alb. L. J. 91.

<sup>5</sup> *In re Dornenou*, 2 Wheel. Crim. (N. Y.) 344.

<sup>6</sup> *In re Wall*, 13 Fed. 814; *In re Jones*, 12 Pa. Co. Ct. 229, 2 Pa. Dist. Ct. 538.

<sup>7</sup> *Smith v. State*, 1 Yerg. (Tenn.) 228.

<sup>8</sup> *State v. Burr*, 19 Neb. 593, 28 N. W. 261.

<sup>9</sup> *In re Naphtaly*, 14 Cent. L. J. (Cal.) 96; *In re Joseph*, 135 App. Div. 589, 120 N. Y. S. 793.

<sup>10</sup> *People v. Ford*, 54 Ill. 520; *In re Weed*, 26 Mont. 507, 68 Pac. 1115.

<sup>11</sup> *In re O'Connell*, 174 Mass. 253,

53 N. E. 1001, 54 N. E. 558; *In re Wellcome*, 23 Mont. 213, 58 Pac. 47; *Matter of Boland*, 127 App. Div. 746, 111 N. Y. S. 932.

<sup>12</sup> *In re Marsh*, (Utah) 129 Pac. 411.

<sup>13</sup> *Underwood v. Com.*, 105 S. W. 151, 32 Ky. L. Rep. 32.

<sup>14</sup> N. Y. Penal Law, § 273. *In re Wellcome*, 23 Mont. 450, 59 Pac. 445.

*The words "misdemeanor in his professional capacity," in the statute relating to attorneys, do not mean offenses punishable by fine and imprisonment in the county jail, but merely professional misbehavior.* *In re Bowman*, 7 Mo. App. 569.

<sup>15</sup> *U. S. v. Porter*, 2 Cranch (C. C.) 60, 27 Fed. Cas. No. 16,072. *Compare In re Stryker*, 1 Wheel. Crim. (N. Y.) 330.

<sup>16</sup> *In re Wellcome*, 23 Mont. 140, 58 Pac. 45.

<sup>17</sup> See *supra*, § 817.

<sup>18</sup> *In re Coffey*, 123 Cal. 522, 56 Pac. 448; *People v. Varnum*, 28 Colo. 349,

was employed to prosecute an unliquidated claim for a contingent fee, wrote to the defendant under an assumed name, and threatened him with a prosecution for perjury, it was held that the fact that he was employed as attorney in the cause, was no defense to a charge of blackmail.<sup>19</sup> So, where an attorney for a deserted wife wrote letters to the husband implying that if he did not pay certain money and turn over certain property to the wife, and induce his paramour, with whom, it was claimed, he was living in another state in adultery, to secure the dismissal of certain civil proceedings on a note given by the husband to such paramour, criminal proceedings would be instituted against them, and they would be extradited and tried, it was held that such acts constituted extortion, without reference to the justness of the wife's claim or the attorney's intention, requiring the attorney's suspension from practice.<sup>20</sup> It is also blackmail, for which disbarment will be ordered, for an attorney to threaten a former client with a prosecution for the violation of the laws of the state, which would tend to disgrace him, unless he paid to the attorney a certain sum claimed for services.<sup>1</sup>

### § 856. Conviction of Crime as Ground for Disbarment. —

A conviction of crime is usually considered a sufficient ground for disbarment;<sup>2</sup> and one convicted of crime in a federal court, may

64 Pac. 202; *In re Sherin*, 28 S. D. 420, 133 N. W. 701, *modifying* 27 S. D. 232, Ann. Cas. 1913D 446, 130 N. W. 761. See also *In re Huston*, 127 App. Div. 492, 111 N. Y. S. 731.

<sup>19</sup> *People v. Wickes*, 112 App. Div. 39, 20 N. Y. Crim. 9, 98 N. Y. S. 163.

<sup>20</sup> *In re Sherin*, 27 S. D. 232, Ann. Cas. 1913D 446, 130 N. W. 761.

<sup>1</sup> *People v. Barnum*, 28 Colo. 349, 64 Pac. 202.

<sup>2</sup> *In re Coffey*, 123 Cal. 522, 56 Pac. 448; *Walker v. Com.*, 8 Bush (Ky.) 86; *In re Kirby*, 10 S. D. 414, 73 N. W. 907, 39 L.R.A. 856.

*In England* the rule seems to be that an attorney will be stricken

from the roll if convicted of felony, or of a misdemeanor involving want of integrity, even though the judgment be arrested or reversed for error; and also (without a previous conviction) if he is guilty of gross misconduct in his profession, or of acts which, though not done in his professional capacity, gravely affect his character as an attorney; but in the latter case, if the acts charged are indictable, and are fairly denied, the court will not proceed against him until he has been convicted by a jury, and will in no case compel him to answer under oath to a charge for which he may be indicted. See

be disbarred or otherwise disciplined in a state court.<sup>3</sup> In most jurisdictions the conviction of crime constitutes a statutory ground of disbarment, but, as a rule, statutes of this character are merely declaratory of the law as it existed prior to their enactment.<sup>4</sup> A confession or plea of guilty is, of course, the equivalent of a conviction by jury.<sup>5</sup> As to the nature of the crime conviction of which will warrant disbarment, in the absence of a statutory enumeration, it would seem that it must tend to show that one who is guilty thereof is unfitted to occupy the office of an attorney at law.<sup>6</sup> In most instances, however, where conviction is made a statutory ground for disbarment, the statutes specify particular crimes, or designate a classification thereof, which shall constitute a sufficient cause for removal. Thus, it is commonly provided that an attorney may be disbarred where he has been convicted of a felony,<sup>7</sup> or of treason,<sup>8</sup> or of any other crime involving moral turpi-

Anonymous, 3 N. & P. 389; *Matter of* ———, 5 B. & Ad. 1088, 27 E. C. L. 275; *Stephens v. Hill*, 10 M. & W. 28; *Matter of King*, 8 Q. B. 129, 55 E. C. L. 129; *Matter of Garbett*, 18 C. B. 403, 86 E. C. L. 403; *Matter of Blake*, 3 El. & El. 34, 107 E. C. L. 34; *Re Hill*, L. R. 3 Q. B. 543; *Ex p.* ———, 2 Dowl. 110.

<sup>3</sup> *In re Robinson*, 140 App. Div. 329, 125 N. Y. S. 193; *State v. Biggs*, 52 Ore. 433, 97 Pac. 713; *In re Kirby*, 10 S. D. 414, 73 N. W. 907, 39 L.R.A. 856.

<sup>4</sup> See *supra*, § 759. See also *Nelson v. Com.*, 128 Ky. 779, 109 S. W. 337, 16 L.R.A.(N.S.) 272, 33 Ky. L. Rep. 143. But see *In re Darmstadt*, 35 App. Div. 285, 55 N. Y. S. 22, in which it was held that the statute was not retroactive so as to preclude the attorney from showing that the crime involved no moral turpitude.

<sup>5</sup> *Walker v. Com.*, 8 Bush (Ky.) 86; *Nelson v. Com.*, 128 Ky. 779, 109 S. W. 337, 16 L.R.A.(N.S.) 272, 33 Ky. L. Rep. 143.

*But a demurrer to the evidence*, which was not allowable, is not an admission of guilt. *In re Ebbs*, 150 N. C. 44, 17 Ann. Cas. 592, 63 S. E. 190, 19 L.R.A.(N.S.) 892.

<sup>6</sup> See *Ex p. Thompson*, 32 Ore. 499, 52 Pac. 570, 40 L.R.A. 194.

<sup>7</sup> *Colorado*.—*People v. Adams*, 26 Colo. 412, 58 Pac. 603; *People v. Bryce*, 36 Colo. 125, 84 Pac. 816.

*Kentucky*.—*Nelson v. Com.*, 127 Ky. 779, 109 S. W. 337, 16 L.R.A.(N.S.) 272, 33 Ky. L. Rep. 143.

*Michigan*.—*In re McCarthy*, 42 Mich. 71, 51 N. W. 963.

*Minnesota*.—*In re Madigan*, 66 Minn. 9, 68 N. W. 1102.

*New York*.—*In re E.*, 65 How. Pr. 171.

*Oregon*.—*Ex p. Thompson*, 32 Ore. 499, 52 Pac. 570, 40 L.R.A. 194; *State v. Biggs*, 52 Ore. 433, 97 Pac. 713.

*South Dakota*.—*In re Kirby*, 10 S. D. 322, 73 N. W. 92, 39 L.R.A. 856, 859.

<sup>8</sup> *Nelson v. Com.*, 127 Ky. 779, 109 S. W. 337, 16 L.R.A.(N.S.) 272, 33

tude.<sup>9</sup> And it has been held that an attorney may be disbarred where he has been convicted of murder,<sup>10</sup> forgery,<sup>11</sup> embezzlement,<sup>12</sup> receiving stolen property,<sup>13</sup> sending indecent matter through the mails,<sup>14</sup> obstructing the administration of justice,<sup>15</sup> bastardy,<sup>16</sup> and other crimes punishable by imprisonment;<sup>17</sup> and in some instances the conviction of certain crimes works, of itself, a disqualification and requires disbarment.<sup>18</sup>

**§ 857. Conviction Involving Moral Turpitude.**—It is provided by statute in several jurisdictions that an attorney may be disbarred where he has been found guilty of unprofessional conduct involving moral turpitude;<sup>19</sup> but misconduct of this charac-

Ky. L. Rep. 143; *Com. v. Roe*, 129 Ky. 650, 112 S. W. 683, 19 L.R.A.(N.S.) 413.

<sup>9</sup> See the following section.

<sup>10</sup> *Matter of Patrick*, 136 App. Div. 450, 120 N. Y. S. 1006.

<sup>11</sup> *Nelson v. Com.*, 127 Ky. 779, 109 S. W. 337, 16 L.R.A.(N.S.) 272, 33 Ky. L. Rep. 143.

<sup>12</sup> *People v. Bryce*, 36 Colo. 125, 84 Pac. 816.

<sup>13</sup> *In re Kirby*, 10 S. D. 322, 73 N. W. 92, 39 L.R.A. 856, 859.

<sup>14</sup> *People v. Propper*, 220 Ill. 455, 77 N. E. 208.

<sup>15</sup> See *supra*, §§ 816-838. See also *In re Robinson*, 140 App. Div. 329, 125 N. Y. S. 193.

<sup>16</sup> *People v. Propper*, 220 Ill. 455, 77 N. E. 208. Compare *State v. Byrket*, 4 Ohio Dec. 89, 3 Ohio N. P. 28.

<sup>17</sup> *In re Niles*, 5 Daly (N. Y.) 465, 48 How. Pr. 246.

<sup>18</sup> See *infra*, § 858.

<sup>19</sup> *United States*.—*In re Kirby*, 84 Fed. 606; *U. S. v. Parks*, 93 Fed. 414.

*California*.—*In re Coffey*, 123 Cal. 522, 56 Pac. 448.

*Idaho*.—*In re Henry*, 15 Idaho 755, 99 Pac. 1054, 21 L.R.A.(N.S.) 207.

*Montana*.—*In re Thresher*, 33 Mont. 441, 8 Ann. Cas. 845, 84 Pac. 876, 114 Am. St. Rep. 834.

*Ohio*.—*In re Thatcher*, 80 Ohio St. 492, 89 N. E. 39; *In re Dellenbaugh*, 9 Ohio Cir. Dec. 325, 17 Ohio Cir. Ct. 106.

*Oregon*.—*Ex p. Biggs*, 52 Ore. 433, 97 Pac. 713.

*South Dakota*.—*In re Kirby*, 10 S. D. 322, 73 N. W. 92, 39 L.R.A. 856, 859.

*Not Cruel or Unusual Punishment*.—A judgment of disbarment upon conviction for a misdemeanor involving moral turpitude, in addition to a fine imposed for the offense, is not cruel or unusual punishment, within the constitutional prohibition. *In re Coffey*, 123 Cal. 522, 56 Pac. 448.

*Extent of Discipline*.—Under Oregon Code, § 1047, authorizing the removal or suspension of an attorney on his conviction of any felony or misdemeanor involving moral turpitude, of which the record of his conviction is conclusive evidence, the court may go behind the record of conviction to determine the extent of the discipline to be administered. *State v. Mason*, 29 Ore. 18, 43 Pac. 651.

ter would warrant disbarment irrespective of statutory authority.<sup>20</sup> "Moral turpitude," it has been said, includes everything which is done contrary to justice, honesty, modesty, or good morals.<sup>1</sup> Thus, it has been held that an attorney may be disbarred where he has been convicted of attempting to extort money or other property from another by threats.<sup>2</sup> Libel is also a misdemeanor which involves moral turpitude, and for which an offender may be disbarred.<sup>3</sup> Under a statute which authorized the removal of an attorney where he had been convicted of a felony or a misdemeanor involving moral turpitude, it was held that the words "felony" and "misdemeanor" were used in their statutory sense, and that the conviction of an offense in a federal court for "conspiracy to suborn perjury" was not conclusive, in a disbarment proceeding, of the commission of an act warranting disbarment, there being no such offense known to the law of the state.<sup>4</sup> And in another case it was held that a statute which provided for disbarment on conviction of a crime involving moral turpitude, or for unprofessional conduct of the same character, did not provide separate and distinct causes for removal.<sup>5</sup>

**§ 858. Conviction as Ipso Facto Disqualification or Disbarment.** — The New York judiciary law provides that "any person, being an attorney and counselor at law, who shall be convicted of a felony, shall, upon such conviction, cease to be an attorney and counselor at law, or to be competent to practice law as such. Whenever any attorney and counselor at law shall be convicted of a felony, there may be presented to the appellate division of the supreme court a certified or exemplified copy of the judgment of such conviction, and thereupon the name of the person so convicted shall, by order of the court, be stricken from the roll of attorneys."<sup>6</sup> But, although

<sup>20</sup> See *supra*, § 759.

<sup>1</sup> *In re Hopkins*, 54 Wash. 569, 103 Pac. 805.

<sup>2</sup> *In re Coffey*, 123 Cal. 522, 56 Pac. 418. And see also *supra*, § 855.

<sup>3</sup> *State v. Mason*, 29 Ore. 18, 43 Pac. 651, 54 Am. St. Rep. 772. And see also *supra*, §§ 788-790.

<sup>4</sup> *Ex p. Biggs*, 52 Ore. 433, 97 Pac. 713.

<sup>5</sup> *In re Dellenbaugh*, 9 Ohio Cir. Dec. 325, 17 Ohio Cir. Ct. 106.

<sup>6</sup> New York Judiciary Law, §§ 88 (3), 477, as amended by L. 1912, c. 253. See also *In re Kristeller*, 151 App. Div. 556, 139 N. Y. S. 64. This

the New York law also provides that a misdemeanor or other crime shall constitute ground for removal,<sup>7</sup> a conviction of such crimes does not, of itself, work a disbarment.<sup>8</sup> A North Carolina statute provides that an attorney at law must be removed from office "upon his being convicted of a crime punishable by imprisonment in the penitentiary."<sup>9</sup>

**§ 859. Conviction in Another Jurisdiction.** — An attorney has been disbarred where it appeared that, prior to his admission, he had been convicted of embezzlement in another state.<sup>10</sup> But it would seem that the mere fact of having been convicted of a crime in another state is not, in itself, necessarily a sufficient ground for disbarment, but that such fact will be considered in connection with the other evidence in arriving at a conclusion;<sup>11</sup> and disbarment will not be ordered where the conviction occurred many years before the respondent's admission to the bar, and it appears that he has led an upright life since that time.<sup>12</sup> And under a North Carolina statute which provides that the conviction of certain crimes shall work a disbarment,<sup>13</sup> it has been held that the court is not thereby authorized to disbar an attorney because of his having been convicted of a crime in another state.<sup>14</sup>

**§ 860. Necessity of Conviction.** — In several jurisdictions it is held that there must be a trial and conviction for criminal mis-

statute is mandatory upon the court. *Matter of Patrick*, 136 App. Div. 450, 120 N. Y. S. 1006.

The regularity of the proceedings by which the attorney was convicted in another court having jurisdiction of the offense, cannot be attacked in the disbarment proceedings in the absence of an allegation that the criminal court did not have jurisdiction over his person or that he was not the person named in the indictment. *Matter of Patrick*, 136 App. Div. 450, 120 N. Y. S. 1006.

<sup>7</sup> N. Y. Judiciary Law, § 88 (2).

<sup>8</sup> *In re Robinson*, 140 App. Div. 329, 125 N. Y. S. 193.

<sup>9</sup> P. L. of North Carolina, c. 941. See also *Matter of Ebbs*, 150 N. C. 44, 17 Ann. Cas. 592, 63 S. E. 190, 19 L.R.A.(N.S.) 892.

<sup>10</sup> *People v. Gillmore*, 214 Ill. 569, 73 N. E. 737, 69 L.R.A. 701.

<sup>11</sup> *People v. Payson*, 215 Ill. 476, 74 N. E. 383. See also *People v. Hahn*, 197 Ill. 137, 64 N. E. 342; *People v. Propper*, 220 Ill. 455, 77 N. E. 208; *Smith v. State*, 1 Yerg. (Tenn.) 228.

<sup>12</sup> *People v. Coleman*, 210 Ill. 79, 71 N. E. 693.

<sup>13</sup> See the preceding section.

<sup>14</sup> *In re Ebbs*, 150 N. C. 44, 17 Ann. Cas. 592, 63 S. E. 190, 19 L.R.A. (N.S.) 892.

conduct before disbarment will be ordered because thereof,<sup>15</sup> and this is especially true as to those crimes which, although they seriously affect the moral character of those who commit them, have no direct connection with an attorney's practical and immediate relation to the courts; and in some instances the requirement that there must first be a conviction is confined to crimes of this character,<sup>16</sup> the power of the court being limited to a suspension of the attorney until the case may be tried on indictment.<sup>17</sup> But conviction is frequently rendered necessary because of statutory provisions which have been held to require it,<sup>18</sup> and it has also been held that such statutes do not deprive the court of any of its inher-

<sup>15</sup> *California*.—*People v. Treadwell*, 66 Cal. 400, 5 Pac. 686; *In re Tilden*, 25 Pac. 687. See also *Matter of Wyatt*, 102 Cal. 264, 36 Pac. 586; *In re Delmas*, 139 Cal. xix mem., 72 Pac. 402; *In re Lowenthal*, 37 Pac. 526. Compare *Ex p. Tyler*, 107 Cal. 78, 40 Pac. 33.

*Idaho*.—*In re Tipton*, 4 Idaho 513, 42 Pac. 504.

*Illinois*.—*People v. Comstock*, 176 Ill. 192, 52 N. E. 67.

*Louisiana*.—*Chevalon v. Schmidt*, 11 Rob. 91; *Turner v. Walsh*, 12 Rob. 383.

*Missouri*.—*State v. Foreman*, 3 Mo. 602; *State v. Gebhardt*, 87 Mo. App. 542; *Matter of Z.*, 89 Mo. App. 426.

*North Carolina*.—*Ex p. Schenck*, 65 N. C. 353; *Kane v. Haywood*, 66 N. C. 1.

*South Dakota*.—See *In re Sherin*, 27 S. D. 232, Ann. Cas. 1913D 446, 130 N. W. 761.

*Virginia*.—*Ex p. Fisher*, 6 Leigh 619.

*West Virginia*.—*State v. Hays*, 64 W. Va. 45, 61 S. E. 355.

<sup>16</sup> *United States*.—*Ex p. Wall*, 107 U. S. 265, 2 S. Ct. 569, 27 U. S. (L. ed.) 552, *affirming* 13 Fed. 814.

*Illinois*.—*People v. Allison*, 68 Ill. 151.

*Kentucky*.—*Beckner v. Com.*, 126 Ky. 318, 103 S. W. 378, 128 Am. St. Rep. 287.

*Montana*.—See *In re Wellcome*, 23 Mont. 140, 58 Pac. 45; *In re Weed*, 26 Mont. 507, 68 Pac. 1115.

*New Jersey*.—Anonymous, 7 N. J. L. 162.

*New York*.—*Rochester Bar Assoc. v. Dorthy*, 152 N. Y. 596, 46 N. E. 835, *affirming* 8 App. Div. 611, 41 N. Y. S. 1112, 75 N. Y. St. Rep. 1480.

*North Carolina*.—*In re Ebbs*, 150 N. C. 44, 17 Ann. Cas. 592, 63 S. E. 190, 19 L.R.A.(N.S.) 892.

*Ohio*.—*In re Dellenbaugh*, 9 Ohio Cir. Dec. 325; *State v. Byrckett*, 4 Ohio Dec. 89; *Ex p. Bickley*, 16 Ohio Dec. 569.

*Pennsylvania*.—*Ex p. Steinman*, 95 Pa. St. 220, 40 Am. Rep. 637, *reversing* 8 W. N. C. 296.

<sup>17</sup> *State v. Gebhardt*, 87 Mo. App. 542; *State v. Reynolds*, (Mo.) 158 S. W. 671.

<sup>18</sup> See the cases cited under the preceding notes; and see also *In re Granger*, 15 Nev. 56; *State v. Reynolds*, (Mo.) 158 S. W. 671.



ent rights.<sup>19</sup> It is not necessary, however, that judgment shall have been entered on the conviction.<sup>20</sup> Even in those jurisdictions wherein conviction is not deemed to be a prerequisite to disbarment for criminal misconduct,<sup>1</sup> the court may, should it see fit to do so, withhold action until the matter has been determined in the proper tribunal for the trial of criminal prosecutions, and it usually will do so where the crime charged does not grow out of any act done in a professional capacity.<sup>2</sup>

**§ 861. Conviction Unnecessary.**—But an attorney may be disbarred in most jurisdictions because of criminal misconduct, even though he has not been convicted thereof, where its nature shows him to be unfit to discharge the duties of his office;<sup>3</sup> nor is

<sup>19</sup> *Ex p. Schenck*, 65 N. C. 353.

<sup>20</sup> *People v. Propper*, 220 Ill. 455, 77 N. E. 208.

<sup>1</sup> See the following section.

<sup>2</sup> *In re Tipton*, 4 Idaho 513, 42 Pac. 504; *Morton v. Watson*, 60 Neb. 672, 84 N. W. 91; *In re Newby*, 76 Neb. 482, 107 N. W. 850; *Ex p. Cowing*, 26 Ore. 572, 38 Pac. 1090.

<sup>3</sup> *United States*.—*Ex p. Wall*, 107 U. S. 265, 2 S. Ct. 569, 27 U. S. (L. ed.) 552, *affirming* 13 Fed. 814; *In re Boone*, 83 Fed. 963; *U. S. v. Parks*, 93 Fed. 414.

*California*.—*Ex p. Tyler*, 107 Cal. 78, 40 Pac. 33; *In re Wharton*, 114 Cal. 367, 46 Pac. 172, 55 Am. St. Rep. 72; *In re Danford*, 157 Cal. 425, 108 Pac. 322.

*Colorado*.—*People v. Mead*, 29 Colo. 344, 68 Pac. 241.

*Florida*.—*State v. Finley*, 30 Fla. 302, 11 So. 500.

*Indiana*.—*Ex p. Walls*, 64 Ind. 461.

*Iowa*.—*Perry v. State*, 3 G. Greene 550; *State v. Howard*, 112 Ia. 256, 83 N. W. 975.

*Kansas*.—*In re Norris*, 60 Kan. 649,

57 Pac. 529; *Matter of Smith*, 73 Kan. 743, 85 Pac. 584.

*Maine*.—See *Sanborn v. Kimball*, 64 Me. 140.

*Massachusetts*.—See *Boston Bar Assoc. v. Greenwood*, 168 Mass. 169, 46 N. E. 568.

*Montana*.—*State v. Cadwell*, 16 Mont. 119, 40 Pac. 176; *In re Thresher*, 33 Mont. 441, 8 Ann. Cas. 845, 84 Pac. 876, 114 Am. St. Rep. 834.

*New York*.—*Rochester Bar Assoc. v. Dorthy*, 152 N. Y. 596, 46 N. E. 835, *affirming* 8 App. Div. 611, 41 N. Y. S. 1112.

*North Carolina*.—*In re Ebbs*, 150 N. C. 44, 17 Ann. Cas. 592, 63 S. E. 190, 19 L.R.A.(N.S.) 892.

*Ohio*.—*In re Dellenbaugh*, 9 Ohio Cir. Dec. 325.

*Oregon*.—*State v. Winton*, 11 Ore. 456, 5 Pac. 337, 50 Am. Rep. 486.

*Pennsylvania*.—*In re Davies*, 93 Pa. St. 116, 39 Am. Rep. 729; *H's Case*, 5 Pa. Dist. Ct. 539; *Stoeckwell's Case*, 7 Pa. Dist. Ct. 311; *Gates's Case*, 1 Pa. Co. Ct. 236.

*South Carolina*.—*Watson v. Citizens' Sav. Bank*, 5 S. C. 159.

it necessary, in such cases, that the offender be indicted.<sup>4</sup> Conceding that there may be good reasons for refusing to disbar an attorney at law solely because he has committed a crime entirely disconnected with his official duties, until he has first been tried and convicted thereof, it would seem that these reasons are not present where the crime with which an attorney is charged as a ground for disbarment is not only a violation of the penal law, but constitutes unprofessional conduct also. Thus, it is clear that an attorney may be charged with the commission of a crime, such as homicide, robbery, larceny, etc., and that such charge may not relate in any way to his dealings with the court or with his client; and it would seem that, in those cases, it is but fair that there should be a conviction before disbarment will be ordered; and this is the theory on which many cases, which sustain this view of the situation, are predicated.<sup>5</sup> Many crimes are, in themselves, professional misconduct which would warrant disbarment irrespective of the fact that they are also a violation of the penal laws; thus, for instance, as to libeling the court,<sup>6</sup> obtaining property by making false representations to the client,<sup>7</sup> certain misappropriations of the client's funds,<sup>8</sup> offenses which tend to pervert or obstruct justice,<sup>9</sup> certain frauds in procuring admission to the bar,<sup>10</sup> and entering into certain unlawful contracts.<sup>11</sup> Misconduct of this character, in whatever form it may appear, constitutes ground for disbarment; and merely because it is of such a nature as to also be punishable as a crime, is no good reason why the court may not order disbarment because thereof, without first awaiting action by the criminal tribunals,<sup>12</sup> unless it is otherwise provided by statute.<sup>13</sup> So disbarment may be ordered while an indictment

*Tennessee*.—*Smith v. State*, 1 Yerg. 228; *Davis v. State*, 92 Tenn. 634, 23 S. W. 59.

*Utah*.—*In re Platz*, 132 Pac. 390.

<sup>4</sup> *Ex p. Wall*, 107 U. S. 265, 2 S. Ct. 569, 27 U. S. (L. ed.) 552, 27 Alb. L. J. 406; <sup>5</sup> *Ky. L. Rep.* 2, *affirming* 64 Ind. 461; *State v. Winton*, 11 Ore. 456, 5 Pac. 337, 50 Am. Rep. 486; *Watson v. Citizens' Sav. Bank*, 5 S. C. 159.

<sup>5</sup> See the preceding section, note 15.

<sup>6</sup> See *supra*, §§ 788-790.

<sup>7</sup> See *supra*, § 797.

<sup>8</sup> See *supra*, §§ 804-815.

<sup>9</sup> See *supra*, §§ 816-838.

<sup>10</sup> See *supra*, §§ 839-842.

<sup>11</sup> See *supra*, §§ 843-845.

<sup>12</sup> See the cases cited in the first note under this section. See also *State v. Finley*, 30 Fla. 302, 11 So. 500; *State v. Mosher*, 128 Ia. 82, 5 Ann. Cas. 984, 103 N. W. 105.

<sup>13</sup> See the preceding section, note.

is pending,<sup>14</sup> though the court may in its discretion suspend the disbarment proceeding to await the result of the prosecution.<sup>15</sup> So too, it has been held that the court may exercise its summary jurisdiction to disbar an attorney for criminal misconduct, even though the grand jury, on a presentation thereto, failed to indict him, and the trial court refused to grant permission to submit the questions involved to a second grand jury. "It is not necessary," said the court, "that, as a condition precedent to the exercise of the jurisdiction of this court in a disbarment proceeding, repeated efforts be made to secure an indictment for crime. Nor will we hold that it is requisite that the attorney-general appeal several times to one judge, or one time to several judges, to impanel a grand jury to investigate charges of bribery, where there has been an investigation into the very charges which are made the foundation for disbarment proceedings by a grand jury duly impaneled under the forms of law, and specially directed to inquire into the truth of such charges."<sup>16</sup> Likewise an attorney may be disbarred for the commission of a crime, although a criminal prosecution therefor is barred by the statute of limitations.<sup>17</sup>

**§ 862. Effect of Appeal.** — The mere fact that an attorney has taken an appeal or sued out a writ of error to review his conviction in a criminal prosecution, will not prevent his disbarment because of such criminal misconduct, even though a supersedeas has been granted;<sup>18</sup> and this, it seems, would be the logical situation in those jurisdictions where disbarment may be ordered for such misconduct irrespective of indictment or conviction thereof.<sup>19</sup> It is reasonable, however, that if the conviction should be reversed, the court would take that fact into consideration on an application for reinstatement,<sup>20</sup> and it is so provided by statute in some

<sup>14</sup> *In re Shoemaker*, 2 Pa. Super. Ct. 27, 38 W. N. C. 414, *affirming* 5 Pa. Dist. Ct. 161, 38 W. N. C. 54.

<sup>15</sup> See preceding section, note 2.

<sup>16</sup> *In re Wellcome*, 23 Mont. 213, 58 Pac. 47.

<sup>17</sup> *U. S. v. Parks*, 93 Fed. 414; *Ex p. Tyler*, 107 Cal. 78, 40 Pac. 33; *In*

*re Weed*, 26 Mont. 507, 68 Pac. 1115; *Stockwell's Case*, 7 Pa. Dist. Ct. 311.

<sup>18</sup> *In re Kirby*, 84 Fed. 606; *In re Kirby*, 10 S. D. 322, 73 N. W. 92, 39 L.R.A. 856; *In re Kirby*, 10 S. D. 414, 73 N. W. 907, 39 L.R.A. 859.

<sup>19</sup> See the preceding section.

<sup>20</sup> See *infra*, §§ 863, 864.

states.<sup>1</sup> In other jurisdictions it is held that disbarment will not be ordered because of a conviction for criminal misconduct, pending an appeal therefrom;<sup>2</sup> and this is especially, but not necessarily, true where conviction is a prerequisite to disbarment.<sup>3</sup> But the court has inherent power to refuse an attorney who has been convicted of crime, and who is required to be confined in jail pending his appeal, permission to appear before it as attorney for another, even though disbarment cannot be ordered until the judgment of conviction has been affirmed.<sup>4</sup>

§ 863. **Effect of Pardon.** — While a pardon “releases the punishment and blots out the existence of guilt, so that in the eye of the law the offender is as innocent as if he had never committed an offense,”<sup>5</sup> it is nevertheless subject to the limitation that it does not restore offices which have been forfeited in consequence of the conviction. And it has been so held as to attorneys who have been disbarred because of a criminal conviction,<sup>6</sup> for the reason that the pardon does not restore their good moral character.<sup>7</sup> The fact that a pardon has been granted, however, may be taken into consideration either on the hearing of the disbarment proceedings, or on an application for reinstatement,<sup>8</sup> and in some states it is so provided by statute.<sup>9</sup> And it has been held that an attorney will not be disbarred because of his conviction of a crime for which he was subsequently pardoned, where many years have elapsed before the matter was brought to the attention of the court, and he has behaved himself with due propriety thereafter.<sup>10</sup> So where, in disbarment proceedings, an attorney alleged that his conviction

<sup>1</sup> N. Y. L. 1912, c. 253, amending § 88 (2) of the N. Y. Judiciary Law.

<sup>2</sup> *People v. Treadwell*, 66 Cal. 400, 5 Pac. 686; *State v. Sale*, 188 Mo. 493, 87 S. W. 967.

<sup>3</sup> See *supra*, § 860.

<sup>4</sup> *Pedersen v. Superior Court*, 149 Cal. 389, 86 Pac. 712.

<sup>5</sup> *Ex p. Garland*, 4 Wall. 333, 18 U. S. (L. ed.) 366.

<sup>6</sup> *People v. Burton*, 39 Colo. 164, 88 Pac. 1063, 121 Am. St. Rep. 165; *In re —*, 86 N. Y. 563.

<sup>7</sup> *People v. George*, 186 Ill. 122, 57 N. E. 804; *People v. Gilmore*, 214 Ill. 569, 73 N. E. 737, 69 L.R.A. 701; *Nelson v. Com.*, 128 Ky. 779, 109 S. W. 337, 16 L.R.A.(N.S.) 272. See also 16 Law Notes, 185-187.

<sup>8</sup> *In re E.*, 65 How. Pr. (N. Y.) 171.

<sup>9</sup> N. Y. L. 1912, c. 253, amending § 88 (2) of the N. Y. Judiciary Law.

<sup>10</sup> *People v. Coleman*, 210 Ill. 79, 71 N. E. 693; *In re Hirst*, 1 W. N. C. (Pa.) 18.

resulted from an unfair trial, and that he was, in fact, innocent, and that, because of these facts, he was pardoned by the governor, it was held that a judgment of disbarment would not be entered on the pleadings.<sup>11</sup> And in Texas it has been held that an attorney will not be disbarred because of a conviction as to which he was subsequently granted an unconditional pardon.<sup>12</sup>

**§ 864. Effect of Acquittal.** — In those jurisdictions wherein conviction is a prerequisite to disbarment for criminal misconduct,<sup>13</sup> an acquittal thereof in the criminal courts necessarily constitutes a complete defense to disbarment proceedings based solely thereon.<sup>14</sup> But where disbarment may be ordered for criminal misconduct without a conviction thereof,<sup>15</sup> an acquittal will not, of course, prevent the entry of an order of suspension or disbarment.<sup>16</sup> Nor is it a defense to disbarment proceedings that the

<sup>11</sup> *People v. Burton*, 39 Colo. 164, 88 Pac. 1063, 121 Am. St. Rep. 165.

<sup>12</sup> *Scott v. State*, 6 Tex. Civ. App. 343, 25 S. W. 337.

<sup>13</sup> See *supra*, § 860.

<sup>14</sup> *People v. John*, 212 Ill. 615, 72 N. E. 789; *State v. Gebhardt*, 87 Mo. App. 542.

<sup>15</sup> See *supra*, § 861.

<sup>16</sup> *People v. Mead*, 29 Colo. 344, 68 Pac. 241; *People v. Thomas*, 36 Colo. 126, 10 Ann. Cas. 886, 91 Pac. 36; *In re —*, 86 N. Y. 563; *In re Platz*, (Utah) 132 Pac. 390. See also *People v. Weeber*, 26 Colo. 229, 57 Pac. 1079.

*In Ex p. Wall*, 107 U. S. 265, 2 S. Ct. 569, 27 U. S. (L. ed.) 552, the court said: "While it may be the general rule that a previous conviction should be had before striking an attorney off the roll for an indictable offense, committed by him when not acting in his character of an attorney, yet the rule is not an inflexible one. Cases may occur in which a re-

quirement would result in allowing persons to practice as attorneys who ought, on every ground of propriety and respect for the administration of the law, to be excluded from such practice. A criminal prosecution may fail by the absence of a witness, or by reason of a flaw in the indictment, or some irregularity in the proceedings; and in such cases, even in England, the proceeding to strike from the roll may be had. But other causes may operate to shield a gross offender from a conviction of crime, however clear and notorious his guilt may be — a prevailing popular excitement, powerful influences brought to bear on the public mind or on the mind of the jury, and many other causes which might be suggested; and yet, all the time, the offender may be so covered with guilt, perhaps glorying in it, that it would be a disgrace to the court to be obliged to receive him as one of its officers, clothed with all the prestige of its confidence and authority."

criminal misconduct charged therein was submitted to a grand jury which refused to find an indictment therefor.<sup>17</sup> So, it has been held that the entry of an *nolle prosequi* in a criminal prosecution does not constitute a defense in disbarment proceedings predicated on the commission of the crime.<sup>18</sup> Nor will the reversal of a judgment of conviction on a point of law, constitute such a defense.<sup>19</sup>

<sup>17</sup> *In re Wellcome*, 23 Mont. 213, 58 Pac. 47.

<sup>18</sup> *In re Davies*, 93 Pa. St. 116, 39 Am. Rep. 729, *affirming* 13 Phila. 65, 36 Leg. Int. 434.

<sup>19</sup> *Matter of King*, 8 Q. B. 129, 55 E. C. L. 129, 10 Jur. 7. See also *Rex v. Southerton*, 6 East (Eng.) 127; *Matter of Garbett*, 18 C. B. 403, 86 E. C. L. 403.

## CHAPTER XXXI.

### PROCEDURE, JUDGMENT AND PUNISHMENT.

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*Nature of Disbarment Procedure.*

§ 865. **Generally.** — The action of a court in exercising its power to disbar an attorney is judicial in character; but the inquiry made is in the nature of an investigation into the conduct of one of its own officers, and not the trial of an action or suit, and the order entered is but an exercise of the disciplinary jurisdiction which it has over such officers.<sup>1</sup> The purpose of exercising this power is to protect the courts, and the administration of justice, from the rapacity or cupidity of those who have been licensed as officers of the court,<sup>2</sup> and who are deemed unworthy to be allowed so to continue.<sup>3</sup> And proceedings for disbarment are instituted merely to annul an extraordinary privilege originally conferred upon those admitted to practice in reliance, among other things, on the fact that they were possessed of a good moral character;<sup>4</sup> they are not intended as a punishment,<sup>5</sup> nor do they affect the right of citizenship in any respect.<sup>6</sup> the question for determination, in all such cases, being whether an attorney who is charged with unprofessional conduct should be permitted to continue in his office.<sup>7</sup>

<sup>1</sup> *In re Durant*, 80 Conn. 140, 10 Ann. Cas. 539, 67 Atl. 497.

<sup>2</sup> *Ex p. Wall*, 107 U. S. 265, 2 S. Ct. 569, 27 U. S. (L. ed.) 552, 27 Alb. L. J. 406, 5 Ky. L. Rep. 2. See also *supra*, § 762.

<sup>3</sup> *State v. Fourchy*, 106 La. 743, 31 So. 325. See also *supra*, §§ 760, 761.

<sup>4</sup> See *supra*, § 34.

<sup>5</sup> See *supra*, §§ 760-762.

<sup>6</sup> *In re Thatcher*, 83 Ohio St. 246, Ann. Cas. 1912A 810, 93 N. E. 895.

<sup>7</sup> *Ex p. Wall*, 107 U. S. 265, 2 S. Ct. 569, 27 U. S. (L. ed.) 552, 27 Alb. L. J. 406, 5 Ky. L. Rep. 2; *In re Spencer*, 137 App. Div. 330, 122 N. Y. S. 190.



§ 866. **Summary Procedure.**—It is well settled that the court may summarily suspend or disbar an attorney at law for unprofessional conduct,<sup>8</sup> because he is an officer thereof,<sup>9</sup> providing the bounds of due process of law are not transgressed.<sup>10</sup> But the right to practice law is a valuable one, of which an attorney can be deprived only by the judgment of a court of competent jurisdiction, after notice and a full opportunity to be heard in his own defense.<sup>11</sup> Thus, while certain contempts of court constitute a ground for disbarment,<sup>12</sup> an attorney who is guilty thereof cannot be summarily disbarred as a punishment in the contempt proceedings.<sup>13</sup> And in some jurisdictions disbarment will be ordered for certain charges only after the matter has been submitted to the tribunal which ordinarily has jurisdiction thereof.<sup>14</sup> So, it has been held that a court may not exercise summary jurisdiction in disbarment proceedings as to charges which affect an attorney's character as a citizen only, and are entirely disconnected with his professional relation to the court and his clients.<sup>15</sup>

<sup>8</sup> *United States*.—Ex p. Wall, 107 U. S. 265, 2 S. Ct. 569, 27 U. S. (L. ed.) 552, 27 Alb. L. J. 406, 5 Ky. L. Rep. 2; Ex p. Burr, 2 Cranch (C. C.) 379, 4 Fed. Cas. No. 2,186.

*Connecticut*.—In re Durant, 80 Conn. 140, 10 Ann. Cas. 539, 67 Atl. 497.

*Florida*.—State v. Maxwell, 19 Fla. 31.

*Kentucky*.—Rice v. Com., 18 B. Mon. 472.

*Virginia*.—In re Fisher, 6 Leigh 619.

*West Virginia*.—State v. Stiles, 48 W. Va. 425, 37 S. E. 620.

*Wisconsin*.—Vernon County Bar Ass'n v. McKibbin, 153 Wis. 350, 141 N. W. 283.

<sup>9</sup> See *supra*, § 760.

<sup>10</sup> Shackleford v. McElhinney, 241 Mo. 592, 145 S. W. 1139; Vernon Attys. at L. Vol. II.—81.

County Bar Ass'n v. McKibbin, 153 Wis. 350, 141 N. W. 283.

<sup>11</sup> Shackleford v. McElhinney, 241 Mo. 592, 145 S. W. 1139. And see *infra*, § 882.

<sup>12</sup> See *supra*, §§ 791, 792.

<sup>13</sup> People v. Turner, 1 Cal. 143, 52 Am. Dec. 295; State v. Root, 5 N. D. 487, 67 N. W. 596, 57 Am. St. Rep. 568; Ex p. Kearby, 35 Tex. Crim. 634, 34 S. W. 962; State v. Sachs, 2 Wash. 373, 26 Pac. 865, 26 Am. St. Rep. 857.

<sup>14</sup> See *supra*, §§ 860, 861, as to the necessity of trial and conviction for criminal misconduct. And see also the California cases cited *supra*, § 809, as to the necessity of submitting charges of misappropriation of a client's funds to trial in an action for the recovery thereof.

<sup>15</sup> Neff v. Kohler Mfg. Co., 90 Mo. App. 296.

§ 867. **Whether Civil or Criminal Proceeding.**—The great weight of authority sustains the view that a proceeding to disbar an attorney is civil, not criminal, in its nature, and is governed by the rules applicable to civil actions,<sup>16</sup> the purpose thereof being to purify the bar, and not to punish the respondent.<sup>17</sup> But in some jurisdictions it is held that proceedings of this character are of a *quasi*-criminal nature, especially in so far as the proof of the grounds of disbarment is concerned;<sup>18</sup> thus it was said in one case: "We think the proceeding to disbar an attorney is a criminal proceeding, or at least it is a *quasi*-criminal proceeding. Such a proceeding is for the public. It is always for misconduct on the part of the attorney. It is not for money or other property, and not to recover for any pecuniary loss sustained by the public. And it always involves disgrace to defendant. It takes from him a right of which he is already in possession. It takes away his business and his means of gaining a livelihood. And this it does, not for the purpose of giving the same to some other person, or to the

<sup>16</sup> *United States*.—Ex p. Wall, 107 U. S. 265, 2 S. Ct. 569, 27 U. S. (L. ed.) 552, 27 Alb. L. J. 406, 5 Ky. L. Rep. 2; Ex p. Burr, 2 Cranch (U. C.) 379, 4 Fed. Cas. No. 2,186; *Philbrook v. Newman*, 85 Fed. 139. *Arkansas*.—*Wernimont v. State*, 101 Ark. 210, Ann. Cas. 1913D 1156, 112 S. W. 194.

*District of Columbia*.—*Bradley v. Fisher*, 7 D. C. 32, *affirmed* 13 Wall. 335, 20 U. S. (L. ed.) 646; *Garfield v. U. S.*, 32 App. Cas. 109.

*Illinois*.—*Keithley v. Stevens*, 238 Ill. 199, 87 N. E. 375, 128 Am. St. Rep. 120, *affirming* 142 Ill. App. 406.

*Indiana*.—In re Darrow, 83 N. E. 1026.

*Iowa*.—*State v. Clarke*, 46 Ia. 155; *Slemmer v. Wright*, 46 Ia. 705.

*Kentucky*.—*Com. v. Richie*, 111 Ky. 366, 70 S. W. 1054, 24 Ky. L. Rep. 1218.

*Louisiana*.—*State v. Rightor*, 49 La. Ann. 1015, 22 So. 195.

*Montana*.—In re Wellcome, 23 Mont. 259, 58 Pac. 711; In re Thresher, 33 Mont. 441, 8 Ann. Cas. 845, 84 Pac. 876, 114 Am. St. Rep. 834.

*North Carolina*.—In re Ebbs, 150 N. C. 44, 17 Ann. Cas. 592, 63 S. E. 190, 19 L.R.A.(N.S.) 892.

*North Dakota*.—In re Crum, 7 N. D. 316, 75 N. W. 257.

*Oklahoma*.—In re Biggers, 24 Okla. 842, 104 Pac. 1083, 25 L.R.A.(N.S.) 622.

*Texas*.—*Scott v. State*, 86 Tex. 321, 24 S. W. 789, *overruling State v. Tunstall*, 51 Tex. 81.

*Washington*.—*State v. Rossman*, 53 Wash. 1, 17 Ann. Cas. 625, 101 Pac. 357, 21 L.R.A.(N.S.) 821.

<sup>17</sup> See *supra*, § 762.

<sup>18</sup> *Thomas v. State*, 58 Ala. 365; In re Baluss, 28 Mich. 507; In re An Attorney, 1 Hun (N. Y.) 321.

state, but simply to deprive the defendant of the same.”<sup>19</sup> And it would seem also that statutes providing for the disbarment of attorneys are so far penal in character as to require a strict construction.<sup>20</sup>

### *Who May Institute Proceedings.*

§ 868. **Generally.**—In the absence of a statute providing otherwise, it would seem that disbarment proceedings may be instituted on the information of any person interested,<sup>1</sup> and in some instances it is expressly provided that such proceedings may be so commenced.<sup>2</sup> Thus, a client who has been injured may prosecute proceedings for disbarment, notwithstanding a statute to the effect that the prosecuting attorney shall attend thereto.<sup>3</sup> So, disbarment proceedings may be instituted by members of the bar,<sup>4</sup> or by the bar association,<sup>5</sup> or the attorney-general,<sup>6</sup> or the prosecuting attorney,<sup>7</sup> or the court.<sup>8</sup> And it has been held that the fact that a statute provides for the institution of proceedings by the client,

<sup>19</sup> *Peyton's Appeal*, 12 Kan. 398.

<sup>20</sup> *State v. Quarles*, 158 Ala. 54, 48 So. 499; *Klingensmith v. Kepler*, 41 Ind. 341; *State v. Byrnett*, 4 Ohio Dec. 89, 3 Ohio N. P. 28.

<sup>1</sup> *Fairfield County Bar v. Taylor*, 60 Conn. 11, 22 Atl. 441, 13 L.R.A. 767; *Byington v. Moore*, 70 Ia. 206, 30 N. W. 485; *In re Welleome*, 23 Mont. 140, 58 Pac. 45; *Vernon County Bar Ass'n v. McKibbin*, 153 Wis. 350, 141 N. W. 283.

*Compare* *People v. Allison*, 68 Ill. 151, wherein it was said that an attorney will not be disbarred at the relation of a stranger for failure to pay over money to a client, where the client makes no complaint.

<sup>2</sup> *People v. Chamberlain*, 242 Ill. 260, 89 N. E. 994.

<sup>3</sup> *Wilson v. Popham*, 91 Ky. 327, 15 S. W. 859.

<sup>4</sup> *People v. Chamberlain*, 242 Ill.

260, 89 N. E. 994; *In re Radford*, 159 Mich. 91, 123 N. W. 546, 16 Detroit Leg. N. 757; *State v. Harber*, 129 Mo. 271, 31 S. W. 889; *In re Bowman*, 7 Mo. App. 569.

<sup>5</sup> See the following section.

<sup>6</sup> *Wilson v. Popham*, 91 Ky. 327, 15 S. W. 859; *State v. Mullins*, 129 Mo. 231, 31 S. W. 744; *State v. Harber*, 129 Mo. 271, 31 S. W. 889. See also *State v. Judge*, 3 Rob. (La.) 416.

<sup>7</sup> *Wilson v. Popham*, 91 Ky. 327, 15 S. W. 859; *In re Shepard*, 109 Mich. 631, 67 N. W. 971.

*The New York Judiciary Law*, § 476, provides: "It shall be the duty of any district attorney within a department, when so designated by the appellate division of the supreme court, to prosecute all cases for the removal or suspension of attorneys and counselors."

<sup>8</sup> See *infra*, § 870.

does not prevent other parties interested from prosecuting such proceedings. "Thus," said the court, on this point, "we would have the anomalous state of affairs presented that a practicing attorney, who was guilty of conduct that brought censure and reproach upon the profession and the courts, could not be punished because the particular individual whom he had wronged did not wish to institute proceedings against him. This construction is too narrow. It takes from the court the right to discipline its officers, and denies it the power to take such action as may be necessary to punish an offender who is bringing the administration of justice into disrepute."<sup>9</sup> So, it has been held that one who prefers charges against an attorney, is neither a necessary nor proper party to disbarment proceedings brought thereon;<sup>10</sup> and also that such proceedings involve only matters between the court, the attorney,<sup>11</sup> and the public.<sup>12</sup> It is clear, however, that an exclusive method of procedure may be provided for by legislation, and the local statutes should be consulted. But a requirement that proceedings shall be instituted by certain persons, is waived by appearing and answering in a proceeding commenced otherwise.<sup>13</sup>

§ 869. **Bar Associations.** — It is not only the right, but it is the duty, of a bar association to bring to the court's attention the fact that a member of the bar, whether he is a member of the association or not, is believed to be guilty of unprofessional conduct which merits censure, suspension, or disbarment.<sup>14</sup> In this respect a bar association is deemed to be an interested party, not only because the members thereof have the rights of other citizens, but also because the association itself is composed of officers of the court, and may be said to truly represent the court in bringing before it a question of misconduct on the part of a member of the

<sup>9</sup> *Com. v. Roe*, 129 Ky. 650, 112 S. W. 683, 19 L.R.A. (N.S.) 413. And see to the same effect *People v. Chamberlin*, 242 Ill. 260, 89 N. E. 994, following *People v. Palmer*, 61 Ill. 255.

<sup>10</sup> *Turner v. Com.*, 2 Mete. (Ky.) 619.

<sup>11</sup> *In re Evans*, (Utah) 130 Pac. 217.

<sup>12</sup> *State v. Martin*, 45 Wash. 76, 87 Pac. 1054, explaining *In re Ault's Disbarment*, 15 Wash. 417, 46 Pac. 644.

<sup>13</sup> *Jackson v. State*, 21 Tex. 668.

<sup>14</sup> *In re Danford*, 157 Cal. 425, 108 Pac. 322.

bar.<sup>15</sup> And in some jurisdictions it is provided by statute that proceedings for disbarment must be instituted by a bar association or its grievance committee.<sup>16</sup> Undoubtedly, disbarment proceedings may be instituted by an individual member of the bar whether he has been appointed by a bar association, or at a bar meeting, for this purpose or not;<sup>17</sup> but where proceedings were brought by a member of the bar, acting in his individual capacity, the court said: "It has been customary in cases such as this to call a meeting of the members of the bar to which the respondent belongs, and in a proper case, after due and thorough deliberation on the accusations brought against him, to select one or more brethren of that bar to institute proceedings for disbarment. By this usual method charges against a respondent are more thoroughly sifted; the serious step of moving to disbar is only taken when a majority of the respondent's brethren of the bar are satisfied that his name should be stricken from the roll of attorneys; and the proceeding is happily relieved of all suspicion of personal or private animosity and prejudice. We do not wish to be understood to condemn the course pursued by [the relator] in this case, nor to question the purity of his motives; we simply wish to indicate the more commendable method. We know of no previous deviations except when an attorney-general or a circuit solicitor moved for the disbarment of an attorney who had been convicted of a felony or an infamous offense, submitting the record as the ground of the motion."<sup>18</sup> It has been held, however, that a bar association is not a recognized body, as such, in proceedings to disbar an attorney, and cannot control the prosecution thereof;<sup>19</sup> and it is true that the court has some discretion as to whom it will recognize in such proceedings. But, while an arbitrary refusal to

<sup>15</sup> *State v. Martin*, 45 Wash. 76, 87 Pac. 1054, *explaining* *In re Ault's Disbarment*, 15 Wash. 417, 46 Pac. 644.

<sup>16</sup> *In re Ebbs*, 150 N. C. 44, 17 Ann. Cas. 592, 63 S. E. 190, 19 L.R.A. (N.S.) 892. The local laws should be consulted in this respect.

<sup>17</sup> *Fairfield County Bar v. Taylor*, 60 Conn. 11, 22 Atl. 441, 13 L.R.A.

767; *In re Ebbs*, 150 N. C. 44, 17 Ann. Cas. 592, 63 S. E. 190, 19 L.R.A. (N.S.) 892; *In re Duncan*, 64 S. C. 461, 42 S. E. 433. And see also the preceding section.

<sup>18</sup> *In re Duncan*, 64 S. C. 461, 42 S. E. 433.

<sup>19</sup> *In re McCarthy's Case*, 42 Mich. 71, 51 N. W. 963.

listen to information from a proper source may be jurisdictional, the source itself is not jurisdictional. The idea that the collective bar, through its representatives, is not entitled to efficiently approach the court in disbarment proceedings, is erroneous. It would be a most radical departure from the ideas, heretofore expressed, "of the close relations between bench and bar, the mutual dependence of each upon the other, and importance to both of maintaining the highest practicable dignity, purity, capability and integrity of the bar, to hold that, though the attorneys of a court petition it, acting substantially as a unit, as regards a matter vital to the integrity of the profession, a deaf ear must, or may, be turned thereto."<sup>20</sup>

### § 870. Right of Court to Act on Its Own Motion.—

All courts of general jurisdiction which have authority to suspend or disbar attorneys,<sup>1</sup> may do so on their own motion in a proper case, without formal complaint or petition,<sup>2</sup> providing the attorney has been duly notified,<sup>3</sup> and has had an opportunity to be heard;<sup>4</sup> and this is especially true where the cause for disbarment occurs in the presence of the court.<sup>5</sup> In some jurisdictions this rule is approved by legislation.<sup>6</sup> It is customary, in those cases, for the court to appoint one or more attorneys for the purpose of drawing up and presenting for approval, a formal accusation;<sup>7</sup>

<sup>20</sup> *Vernon County Bar Ass'n v. McKibbin*, 153 Wis. 350, 141 N. W. 283.

<sup>1</sup> See *supra*, §§ 764-772.

<sup>2</sup> *United States*.—Ex p. Wall, 107 U. S. 265, 2 S. Ct. 569, 27 U. S. (L. ed.) 552, 27 Alb. L. J. 406, 5 Ky. L. Rep. 2.

*Iowa*.—Byington v. Moore, 70 Ia. 206, 30 N. W. 485; *State v. Tracy*, 115 Ia. 71, 87 N. W. 727; *State v. Mosher*, 128 Ia. 82, 5 Ann. Cas. 984, 103 N. W. 105.

*Missouri*.—*State v. Fort*, 178 Mo. 518, 77 S. W. 741.

*New York*.—In re ———, 86 N. Y. 563. See also In re Percy, 36 N. Y. 651.

*Pennsylvania*.—Ex p. Steinman, 95 Pa. St. 220, 40 Am. Rep. 637, reversing 8 W. N. C. 296.

*West Virginia*.—*State v. McClagherty*, 33 W. Va. 250, 10 S. E. 407.

*Wisconsin*.—In re Orton, 54 Wis. 379, 11 N. W. 584; *Vernon County Bar Ass'n v. McKibbin*, 153 Wis. 350, 141 N. W. 283. See also *supra*, § 866.

<sup>3</sup> See *infra*, § 872.

<sup>4</sup> See *infra*, § 882.

<sup>5</sup> *Walker v. Com.*, 8 Bush (Ky.) 86; In re Percy, 36 N. Y. 651.

<sup>6</sup> *State v. Mosher*, 128 Ia. 82, 5 Ann. Cas. 984, 103 N. W. 105.

<sup>7</sup> *State v. Tracy*, 115 Ia. 71, 87 N.

such accusation, however, may contain any matter which may seem to be an appropriate ground for disbarment, irrespective of whether or not it was within the knowledge of the court at the time the order was made.<sup>8</sup> But where a statute permits proceedings to be instituted by direction of the court, or on motion of an individual, and provides that in the former case the court shall appoint an attorney to draw up the accusation, and in the latter that such accusation shall be drawn by the person making it, it was held that where proceedings were commenced by an individual, the court could not be required to appoint an attorney to prosecute the charges.<sup>9</sup>

### *Mode of Proceeding.*

§ 871. **Generally.** — The same rules of law which govern other civil rights are applicable in disbarment proceedings,<sup>10</sup> excepting, possibly, in a few jurisdictions, wherein such a proceeding is deemed to be of a criminal, or *quasi-criminal* nature.<sup>11</sup> The manner of proceeding, in the absence of an exclusive statutory mode, is to be determined by the court,<sup>12</sup> but oppression and injustice must be avoided;<sup>13</sup> for, while such proceedings are of a summary nature, they cannot be used in an arbitrary manner.<sup>14</sup> No particular formality is required,<sup>15</sup> and the proceedings may be en-

W. 727; *State v. Mosher*, 128 Ia. 82, 5 Ann. Cas. 984, 103 N. W. 105.

This procedure is required by statute in Indiana. *Ex p. Trippe*, 66 Ind. 531.

A member of an adjoining bar in the same judicial district may be appointed for this purpose. *State v. Fort*, 178 Mo. 518, 77 S. W. 741.

The fact that the court appoints three attorneys to take charge of disbarment proceedings, and to draw and file the proper accusation, instead of one, is immaterial. *State v. Howard*, 112 Ia. 256, 83 N. W. 975.

<sup>8</sup> *State v. Mosher*, 128 Ia. 82, 5 Ann. Cas. 984, 103 N. W. 105; *State v. Fort*, 178 Mo. 518, 77 S. W. 741.

<sup>9</sup> *Byington v. Moore*, 70 Ia. 206, 30 N. W. 485.

<sup>10</sup> *People v. Amos*, 246 Ill. 299, 92 N. E. 857, 138 Am. St. Rep. 239.

<sup>11</sup> See *supra*, § 867.

<sup>12</sup> *Randall v. Brigham*, 7 Wall. 523, 19 U. S. (L. ed.) 285; *Fairfield County Bar v. Taylor*, 60 Conn. 11, 22 Atl. 441, 13 L.R.A. 767; *In re Durant*, 80 Conn. 140, 10 Ann. Cas. 539, 67 Atl. 497; *Vernon County Bar Ass'n v. McKibbin*, 153 Wis. 350, 141 N. W. 283.

<sup>13</sup> *In re Durant*, 80 Conn. 140, 10 Ann. Cas. 539, 67 Atl. 497.

<sup>14</sup> See *supra*, § 866.

<sup>15</sup> *Wernimont v. State*, 101 Ark. 210, Ann. Cas. 1913D 1156, 142 S. W. 194; *Vernon County Bar Ass'n v.*

titled in the matter of the accused,<sup>16</sup> or in the name of the state,<sup>17</sup> or in any other appropriate manner. But where an exclusive statutory mode of procedure is provided, it should be followed as far as it goes,<sup>18</sup> and such further steps as are found to be necessary may be determined by the court in accordance with the practice in civil suits generally.<sup>19</sup> In some instances statutory provisions of this character may be waived by failing to insist thereon;<sup>20</sup> so, a statutory provision as to who shall have a right to institute disbarment proceedings, has been held not to preclude the commencement of such proceedings by another person.<sup>1</sup>

§ 872. **Necessity of Preferring Charges.**—Before an attorney at law may be removed from office, either under a statute, or by the court in the exercise of its inherent powers, he is entitled to have specific charges made against him, notice thereof, and a full opportunity to be heard. This is a rule of natural justice, and it is as applicable where a proceeding is taken to reach the right of an attorney to practice his profession, as it is in proceedings to reach his real or personal property.<sup>2</sup> The usual method is to set forth specifically the misconduct with which an attorney is charged,<sup>3</sup> in a verified petition,<sup>4</sup> and present the same to the court for examination;<sup>5</sup> and should the court deem the accusations suf-

McKibbin, 153 Wis. 350, 141 N. W. 283. See also *In re Thatcher*, 190 Fed. 969.

<sup>16</sup> *In re Crum*, 7 N. D. 316, 75 N. W. 257.

<sup>17</sup> *Wernimont v. State*, 101 Ark. 210, Ann. Cas. 1913D 1156, 142 S. W. 194; *Turner v. Com.*, 2 Mete. (Ky.) 619; *In re Bowman*, 7 Mo. App. 569.

<sup>18</sup> *In re Danford*, 157 Cal. 425, 108 Pac. 322; *People v. Kavanagh*, 220 Ill. 49, 77 N. E. 107, 110 Am. St. Rep. 223; *Ex p. Trippe*, 66 Ind. 531; *In re Burnette*, 73 Kan. 609, 85 Pac. 575.

<sup>19</sup> *In re Burnette*, 73 Kan. 609, 85 Pac. 575.

<sup>20</sup> *Jackson v. State*, 21 Tex. 668.

<sup>1</sup> See *supra*, § 868.

<sup>2</sup> *Bradley v. Fisher*, 13 Wall. 335, 20 U. S. (L. ed.) 646; *Barnes v. Lyons*, 187 Fed. 881, 110 C. C. A. 15; *Ex p. Trippe*, 66 Ind. 531, statutory requirement; *In re Orton*, 54 Wis. 379, 11 N. W. 584.

<sup>3</sup> See the three following sections.

<sup>4</sup> See *infra*, § 876.

<sup>5</sup> See *infra*, § 877.

Where a complaint against an attorney was made to a judge, who had the papers placed in the files of the county clerk, it was held that the court would take notice that the complaint was never in fact presented to it or brought to its attention. *In re Aldrich*, (Vt.) 86 Atl. 801.



ficient, a rule or order will be issued directing the attorney to show cause why he should not be disbarred.<sup>6</sup> Such rule, together with a copy of the charges preferred against him, should be served upon the attorney,<sup>7</sup> and he may answer or demur thereto, or, should he see fit to do so, he may explain or confess.<sup>8</sup> But where a record of conviction constitutes, in itself, a cause for which an order of disbarment must be entered,<sup>9</sup> a certified copy thereof is usually, by statute, made conclusive evidence in this respect, and no further written accusation need be made,<sup>10</sup> unless it is necessary, under the statute, to show the nature of the crime, as, for instance, that it is one involving moral turpitude.<sup>11</sup>

§ 873. **Manner of Presenting Charges.**—While no special formality is required in presenting charges in disbarment proceedings,<sup>12</sup> the facts should be stated with such certainty and particularity that the court may judge of their sufficiency, and the party charged be fully apprised thereof.<sup>13</sup> The presentation of such charges is not, of course, a trifling matter, nor are the charges to be lightly made;<sup>14</sup> but they do not require the precision or techni-

<sup>6</sup> See *infra*, § 877.

<sup>7</sup> See *infra*, § 877.

<sup>8</sup> See *infra*, § 881.

<sup>9</sup> See *supra*, § 858.

<sup>10</sup> In *re* Bloor, 21 Mont. 49, 52 Pac. 779.

<sup>11</sup> U. S. *v.* Clark, 76 Fed. 560; *State v.* Bannon, (Ore.) 42 Pac. 869.

<sup>12</sup> *Randall v.* Brigham, 7 Wall 523, 19 U. S. (L. ed.) 285; *U. S. v.* Parks, 93 Fed. 414; In *re* Smith, 73 Kan. 743, 85 Pac. 584; *State v.* Hays, 64 W. Va. 45, 61 S. E. 355.

<sup>13</sup> *United States*.—*Randall v.* Brigham, 7 Wall 523, 19 U. S. (L. ed.) 285; In *re* Burr, 2 Cranch (C. C.) 379, 1 Wheel. Crim. 503, 4 Fed. Cas. No. 2,186; *U. S. v.* Parks, 93 Fed. 414.

*Florida*.—*State v.* Finley, 30 Fla. 302, 11 So. 500; *Zachary v.* State, 53 Fla. 94, 43 So. 925.

*Illinois*.—*People v.* Matthews, 217 Ill. 94, 75 N. E. 444.

*Kansas*.—In *re* Smith, 73 Kan. 743, 85 Pac. 584.

*Michigan*.—*Dickinson v.* Dustin, 21 Mich. 561.

*New Mexico*.—In *re* Veeder, 10 N. M. 669, 65 Pac. 180.

*Under an Iowa statute*, it seems, the accusation need not recite the facts upon which the prosecution shall be founded. *State v.* Mosher, 128 Ia. 82, 5 Ann. Cas. 984, 103 N. W. 105.

*For a form of charges*, see In *re* Thatcher, 80 Ohio St. 492, 89 N. E. 39.

<sup>14</sup> In *re* Haskell, 150 App. Div. 837, 135 N. Y. S. 249.

cal accuracy which is necessary in criminal pleading.<sup>15</sup> These principles are illustrated in the two following sections.

§ 874. **Sufficient Charges.** — On the application for an order or rule, in the first instance, it is enough that the matters relied on as grounds for disbarment are clearly stated in some proper form; they need not be accurate in every particular.<sup>16</sup> Thus, where an attorney was charged with failure to maintain the respect due the court, defending an unjust cause, employing means of defense inconsistent with truth, and misleading the court by artifice and falsehood, the facts being set out in narrative form, without allegations connecting them with either of the general charges of misconduct set forth, the petition was held to be good on demurrer.<sup>17</sup> So, where it was charged that an attorney caused the publication of an article, which was wilfully and maliciously false, for the purpose of bringing the court into contempt and disgrace, the petition was deemed to be sufficient.<sup>18</sup> And where a respondent, in disbarment proceedings, was accused of having advised his client to attempt to influence the action of the court in a pending suit by newspaper publications, it was held that the petition was not defective for failing to state the mode by which such advice was communicated.<sup>19</sup> So, an accusation that respondent urged a prosecution for libel, and promised to secure satisfactory evidence of the guilt of the defendant, and stated to his client that the statute of limitations had not run, and at the hearing appeared for the

<sup>15</sup> *United States*. — *Philbrook v. Newman*, 85 Fed. 139.

*Florida*. — *State v. McRae*, 49 Fla. 389, 6 Ann. Cas. 589, 38 So. 605.

*Illinois*. — *Montray v. People*, 162 Ill. 194, 44 N. E. 496; *People v. Montray*, 166 Ill. 639, 47 N. E. 79.

*Kansas*. — *In re Smith*, 73 Kan. 743, 85 Pac. 584.

*Kentucky*. — *In re Woolley*, 11 Bush 95.

*Maine*. — *Sanborn v. Kimball*, 64 Me. 140.

*Missouri*. — See *In re Bowman*, 7 Mo. App. 569.

<sup>16</sup> *Boston Bar Assoc. v. Greenhood*, 168 Mass. 169, 46 N. E. 568. See also *In re Eldridge*, 82 N. Y. 161, 37 Am. Rep. 558. (See also mem. in 2 Ky. L. Rep. 75); *In re Dellenbaugh*, 9 Ohio Cir. Dec. 325, 17 Ohio Cir. Ct. 106.

<sup>17</sup> *In re Lowenthal*, 78 Cal. 427, 21 Pac. 7.

<sup>18</sup> *Cobb v. U. S.*, 172 Fed. 641, 96 C. C. A. 477.

<sup>19</sup> *Ex p. Cole*, 1 McCrary 405, 6 Fed. Cas. No. 2,973.

defendant and set up the statute of limitations, and procured a writ of prohibition and the defendant's discharge thereon, has been held to be good on demurrer.<sup>20</sup> And a charge that the reputation of an attorney for truth and veracity is so notoriously bad that he is not to be believed under oath, it seems, is not too general.<sup>1</sup> It has also been held that a rule to show cause why an attorney's name should not be stricken from the record may be incorporated in, or based on, a decree in a suit in equity against such attorney, wherein he was charged with fraud.<sup>2</sup>

**§ 875. Insufficient Charges.** — A petition for disbarment should show that the respondent is a member of the bar, and all other jurisdictional facts,<sup>3</sup> and should set forth with reasonable certainty and particularity<sup>4</sup> the misconduct for which disbarment is sought;<sup>5</sup> and the failure to do so may render the petition defective. Thus, where an attorney was charged with having made a false affidavit in connection with his application for admission to the bar, the petition was held to be insufficient for failing to state that the applicant knew that his statements were untrue.<sup>6</sup> So, an accusation charging an attorney with having treated the court disrespectfully, and having disobeyed an order thereof, was held to be bad for failing to state the character of the disrespect, or the order which had been disobeyed.<sup>7</sup> And where an attorney was charged with having undertaken to represent conflicting interests to the prejudice of his client, it was held that these charges should be supported by a sufficient recitation of the facts.<sup>8</sup> Nor is a charge sufficiently definite where it alleges that an attorney was in the habit of encouraging the commencement and prosecution of actions for the mere purpose of promoting his own ends and interests, and stirring up and exciting disputes and lawsuits

<sup>20</sup> *In re Stephens*, 77 Cal. 357, 19 Pac. 646.

<sup>1</sup> *In re Mills*, 1 Mich. 392.

<sup>2</sup> *In re Wool*, 36 Mich. 299.

<sup>3</sup> *Thomas v. State*, 58 Ala. 365;

*State v. Quarles*, 158 Ala. 54, 48 So. 499.

<sup>4</sup> See the two preceding sections.

<sup>5</sup> *In re Cobb*, 84 Cal. 550, 24 Pac.

293; *In re Mills*, 1 Mich. 392; *State v. Gebhardt*, 87 Mo. App. 542; *State v. Cadwell*, (Mont.) 36 Pac. 85.

<sup>6</sup> *People v. Comstock*, 176 Ill. 192, 52 N. E. 67.

<sup>7</sup> *Perry v. State*, 3 G. Greene (Ia.) 550.

<sup>8</sup> *In re Collins*, 147 Cal. 8, 81 Pac.

220.

among his neighbors; the particular case or cases in which the attorney had thus misconducted himself should have been set forth.<sup>9</sup> So, a charge that an attorney went to another state to prevent the extradition of one who had been arrested there, and attempted to remove such person from the jurisdiction, was held to be insufficient for failing to state that the fugitive had forfeited his bail, or intended to do so, and that he purposed to remain beyond the jurisdiction and not render himself amenable to process, and also for failing to state the arrest, the purpose thereof, or an attempt to escape.<sup>10</sup> And where a petition was predicated on the fact that the respondent had been convicted of a crime, it was held to be defective for failing to state that such crime involved moral turpitude, where that element was required by statute.<sup>11</sup> A charge that an attorney took certain papers from the files, has also been held to be too indefinite.<sup>12</sup> And where an attorney was charged with having abstracted a subpoena from the clerk's office, it was held that the petition was defective for failing to state the pendency of the cause in which the subpoena had been issued, and also for failing to state the time, place, manner, and intent of the abstraction.<sup>13</sup> A charge has also been held to be too indefinite and uncertain where it stated that an attorney interlined and added to a decree in a certain case after it was signed by the chancellor, but failed to state what was interlined, or the date of the decree, or the court in which the cause was pending, or any date at or about which the alleged interlineation was perpetrated, or whether the paper tampered with belonged to any of the courts of the state, or that the act was done with any bad motive or malicious intent.<sup>14</sup> The court may allow amended or supplemental charges to be filed in a proper case,<sup>15</sup> and improper amendments may be stricken out.<sup>16</sup>

<sup>9</sup> *Reilly v. Cavanaugh*, 32 Ind. 214.

<sup>10</sup> *In re Kaffenburgh*, 188 N. Y. 49, 80 N. E. 570, *affirming* 115 App. Div. 346, 101 N. Y. S. 507.

<sup>11</sup> *U. S. v. Clark*, 76 Fed. 560; *State v. Bannan*, (Ore.) 42 Pac. 869.

<sup>12</sup> *People v. Allison*, 68 Ill. 151.

<sup>13</sup> *State v. Finley*, 30 Fla. 325, 11 So. 674, 18 L.R.A. 401.

<sup>14</sup> *State v. Finley*, 30 Fla. 325, 11 So. 674, 18 L.R.A. 401.

<sup>15</sup> *Wilson v. Popham*, 91 Ky. 327, 15 S. W. 859, 12 Ky. L. Rep. 904; *In re Crum*, 7 N. D. 316, 75 N. W. 257.

<sup>16</sup> *State v. Howard*, 112 Ia. 256, 83 N. W. 975.

§ 876. **Verification.** — The charges should be verified, and all statutory requirements to that effect complied with.<sup>17</sup> And the sufficiency of the verification must be determined by an inspection thereof; the evidence of the affiant cannot be taken for the purpose of showing that he had no personal knowledge as to the charges.<sup>18</sup> But where it is required by statute that "some person" shall verify the accusation, charges preferred by a *quasi*-public body, such as a bar association, or by a public officer whose duty it is to proceed in matters of public interest, need not be verified by a member of the bar association, or by such public officer; and it will be sufficient if the accusation presented has been verified by one who swears to the truth thereof, and such affiant will be deemed to be the accuser, although the charges are presented, and the prosecution conducted, on behalf of the bar association, or of the public.<sup>19</sup> Where, however, an accusation is verified by one who is not the informer, the affidavit should show why it was so made.<sup>20</sup> In some instances verification on information and belief, wherein the source of information is stated, has been held to be sufficient;<sup>1</sup> but such verification is not a sufficient compliance with a statute which requires the charges to be verified as true.<sup>2</sup> An entire accusation, however, will not be dismissed merely because some of the charges therein are verified on information and belief, if those made on positive knowledge are sufficient in themselves.<sup>3</sup> It has also been held that requirements as to the verification of the charges in disbarment proceedings may be departed from for good

<sup>17</sup> *United States*.—Ex p. Burr, 9 Wheat. 529, 6 U. S. (L. ed.) 152.

*California*.—In re Hudson, 102 Cal. 467, 36 Pac. 812; In re Collins, 147 Cal. 8, 81 Pac. 220.

*Florida*.—State v. Kirke, 12 Fla. 278, 95 Am. Dec. 314.

*Missouri*.—State v. Gebhardt, 87 Mo. App. 542.

*New Mexico*.—In re Veeder, 10 N. M. 669, 65 Pac. 180.

*New York*.—In re Roe, 81 App. Div. 656, 81 N. Y. S. 249.

<sup>18</sup> In re Collins, 147 Cal. 8, 81 Pac.

220; State Bar Commission v. Sullivan, 35 Okla. 745, 131 Pac. 703.

<sup>19</sup> In re Collins, 147 Cal. 8, 81 Pac. 220.

<sup>20</sup> In re Hotchkiss, 58 Cal. 39.

<sup>1</sup> In re Burnette, 70 Kan. 229, 78 Pac. 440; In re Veeder, 10 N. M. 669, 65 Pac. 180.

<sup>2</sup> In re Wellcome, 23 Mont. 213, 58 Pac. 47; In re Weed, 26 Mont. 241, 67 Pac. 308.

<sup>3</sup> In re Wellcome, 23 Mont. 213, 58 Pac. 47; In re Disbarment Proceedings, (N. D.) 140 N. W. 710.

cause,<sup>4</sup> as, for instance, when the charges are made by a bar association, the attorney-general, or the prosecuting attorney, and are so grave as to require investigation in the public interest, or in vindication of the accused.<sup>5</sup> The requirements as to verification may also be waived by the respondent, and such waiver will be presumed where charges are made and prosecuted at his request.<sup>6</sup>

§ 877. **Rule to Show Cause and Notice Thereof.**—Having been duly prepared and verified, charges for disbarment must be presented to the court for examination;<sup>7</sup> whereupon, should the court deem the charges to be sufficient, it is customary to grant a rule, order or citation to issue against the attorney directing him to show cause why he should not be disbarred.<sup>8</sup> The respondent

<sup>4</sup> *State v. Gebhardt*, 87 Mo. App. 542.

And see also *Ex p. Wall*, 107 U. S. 265, 2 S. Ct. 569, 27 U. S. (L. ed.) 552, wherein it appears that a prisoner was taken from a jail and hung by a mob during a recess of the court, and that the judge saw the body hanging there upon his return, and was informed by the marshal of the court, who was an eyewitness of the transaction, but who, on account of the excited state of the public mind, declined to make any charge or affidavit, and it also appeared that the respondent actively participated in the crime, and was one of the leaders of the mob, and other information of like import was received from reliable sources, and that, upon the hearing, abundant evidence of the truth of the charge was adduced, and the respondent, having every opportunity to explain his connection with the affair, if innocent, made no attempt to do so, it was held that the proceedings were not rendered void for want of an affidavit.

<sup>5</sup> *People v. Mead*, 29 Colo. 344, 68

Pac. 241; *State Bar Commission v. Sullivan*, 35 Okla. 745, 131 Pac. 703; *In re Evans*, 94 S. C. 414, 78 S. E. 277.

<sup>6</sup> *Ex p. Burr*, 9 Wheat. 529, 6 U. S. (L. ed.) 152. See also *State v. Mosher*, 128 Ia. 82, 5 Ann. Cas. 984, 103 N. W. 105.

<sup>7</sup> *Ex p. Robinson*, 19 Wall. 505, 22 U. S. (L. ed.) 205; *State v. Mosher*, 128 Ia. 82, 5 Ann. Cas. 984, 103 N. W. 105; *State v. Judge*, 3 Rob. (La.) 416; *Smith v. State*, 1 Yerg. (Tenn.) 232.

<sup>8</sup> *United States*.—*Barnes v. Lyons*, 187 Fed. 881, 110 C. C. A. 15.

*Arkansas*.—*Beene v. State*, 22 Ark. 149.

*Florida*.—*State v. Kirke*, 12 Fla. 278, 95 Am. Dec. 314.

*Kentucky*.—*Wilson v. Popham*, 15 S. W. 859, 12 Ky. L. Rep. 904.

*Missouri*.—*State v. Watkins*, 3 Mo. 480.

*Pennsylvania*.—*In re Serfass*, 2 Pa. Co. Ct. 649, 19 W. N. C. 476.

*West Virginia*.—*State v. Shumate*, 48 W. Va. 359, 37 S. E. 618.

A complaint or information is the

correct mode of proceeding against an attorney who is charged with malpractice without the presence of the court, in Kentucky. *Walker v. Com.*, 8 Bush 86.

In *New York* it was held at an early date that the court would not entertain a motion to strike the name of an attorney from the rolls, but that the proper procedure was for the applicant to present to the court evidence of the attorney's misconduct, upon which the court would issue an order directing the attorney to show cause why he should not be disbarred. *Anonymous*, 22 Wend. 656; *Matter of Percy*, 36 N. Y. 651. See also *Matter of Eldridge*, 82 N. Y. 161, 37 Am. Rep. 558. The requirements of this rule have been enforced by the General Term (now Appellate Division) of the Supreme Court in the First Department (*Matter of Brewster*, 12 Hun 109), and by the Appellate Division in the Second Department (*Matter of Brooklyn Bar Assoc.*, 92 App. Div. 612 mem., 86 N. Y. S. 1130). The rule is based upon the theory that all proceedings for the disbarment or suspension of attorneys should originate in the action of the court itself, a course which requires that the person desiring the investigation should present to the court affidavits or other authenticated papers from which the court may decide whether further proceedings ought to be taken. *Anonymous*, 22 Wend. 656; *Matter of Brewster*, 12 Hun 109. Compliance with this rule might not be enforced, however, if the matter were brought to the attention of the court by order of another court (*Matter of Brewster*, *supra*), and, of course, when the court is in possession of the facts it may of its own motion issue an

order to show cause (*Matter of Percy*, 36 N. Y. 651; *Matter of —*, 86 N. Y. 563). The chief objection made in the cases to proceeding by motion of the accuser was that the court was not made acquainted with the nature of the evidence in support of the charges when it was asked to require the attorney to answer. As this may be done as readily by motion on affidavits, etc., as by any other method, and as the statute (*Judiciary Law*, § 476, formerly *Code Civ. Pro.*, § 68) requires merely that the attorney be served with a copy of the charges and be afforded an opportunity of being heard in his defense, the rule seems unnecessarily technical. However, the rule is by no means generally followed at the present day. Thus in the First Department the accepted practice is for the accuser (generally a bar association) to prepare a verified petition stating the charges, supported by affidavits and documentary evidence, if any, and to serve a copy thereof with a notice of motion upon the attorney accused. Upon the return day of the motion the attorney submits to the court his answer and any supporting affidavits and documentary evidence that he may desire. Upon these papers the court determines whether there are issues that ought to be tried, and if that question is decided in the affirmative, the case is sent to a referee to hear the evidence and report the same, together with his conclusions thereon, to the court. Upon the coming in of the referee's report the successful party moves for its confirmation. This method of procedure has been followed in cases too numerous to mention, and has been tacitly sanctioned by the Court of Appeals. In *re Good-*

is entitled to notice, by service, of the rule so granted, and the charges upon which the same is predicated.<sup>9</sup> Sometimes the manner of service is regulated by statute,<sup>10</sup> but, in the absence of such regulation, the mode of service may be prescribed by the court, or the method of serving motions and rules in ordinary civil cases may be adopted. It is not necessary, unless required by statute, to resort to the technical formalities required in the service of writs.<sup>11</sup> It has been held, however, that the respondent is not entitled to notice of charges for misconduct committed in the presence of the court, whether the same be spoken openly, or written or printed in a paper presented to the court.<sup>12</sup> So, where it is provided by statute that an attorney may be disbarred upon presentation to the court of a certified copy of the record of his conviction of certain crimes,<sup>13</sup> it has also been held that a citation to the respondent is unnecessary.<sup>14</sup> The respondent may also waive requirements as to

man, 135 App. Div. 594, 120 N. Y. S. 801, 199 N. Y. 143, 92 N. E. 211; *In re Chadsey*, 141 App. Div. 458, 126 N. Y. S. 456, 201 N. Y. 572, 95 N. E. 1124. See also *In re Kaffenburgh*, 115 App. Div. 346, 101 N. Y. S. 507, 188 N. Y. 49, 80 N. E. 570, where the attorney's answer did not deny the acts alleged in the petition, and the case was submitted to the court upon the pleadings.

<sup>9</sup> *United States*.—Ex p. Robinson, 19 Wall. 505, 22 U. S. (L. ed.) 205; *In re Wall*, 13 Fed. 814; *Barnes v. Lyons*, 187 Fed. 881, 110 C. C. A. 15.

*Connecticut*.—*In re Durant*, 80 Conn. 140, 10 Ann. Cas. 539, 67 Atl. 497.

*Indiana*.—*Hoffren v. Jayne*, 39 Ind. 463, 13 Am. Rep. 281.

*Kansas*.—*In re Peyton*, 12 Kan. 398; *In re Wilson*, 79 Kan. 450, 100 Pac. 75.

*Mississippi*.—Ex p. Heyfron, 7 How. 127.

*New York*.—*In re ———*, 86 N. Y. 563,

*West Virginia*.—*State v. Shumate*, 48 W. Va. 359, 37 S. E. 618.

<sup>10</sup> *In re Walkey*, 26 Colo. 161, 56 Pac. 576.

*The New York Judiciary Law*, § 476, provides: "Before an attorney or counselor is suspended or removed as prescribed in section eighty-eight of this chapter, a copy of the charges against him must be delivered to him personally, or, in case it is established to the satisfaction of the court, that he cannot be served within the state, the same may be served upon him without the state by mail or otherwise as the court may direct, and he must be allowed an opportunity of being heard in his defense."

<sup>11</sup> *In re Wilson*, 79 Kan. 450, 100 Pac. 75.

<sup>12</sup> *In re Woolley*, 11 Bush (Ky.) 95.

<sup>13</sup> See *supra*, § 858.

<sup>14</sup> *In re Bloor*, 21 Mont. 49, 52 Pac. 779.



service by appearing and defending upon the merits without objection.<sup>15</sup>

### *Defenses.*

§ 878. **Generally.** — Defenses in disbarment proceedings may consist of any matter which tends to show either that the charges alleged are not true, or that, if true, they do not constitute grounds for disbarment. It will be seen, therefore, that the preceding chapter, which treats of grounds for disbarment, should be consulted in this connection.<sup>16</sup> It may be said generally that any defense set up must be meritorious, for proceedings of this character are always directed to the end that unworthy men shall not be permitted to continue as officers of the court,<sup>17</sup> and proof to the effect that the respondent has not shown himself to be unworthy is of the greatest importance. It is not a good defense to show that the informant or his witnesses procured the evidence presented by them in a reprehensible manner, though, of course, that fact will be taken into consideration with the other facts in the case.<sup>18</sup> Nor is it material that attorneys other than the respondent are also guilty of misconduct similar to that charged against him.<sup>19</sup> And if the charges are true, it is immaterial that they were instituted through motives of personal spite and revenge.<sup>20</sup> An attorney is not entitled to immunity from disbarment merely because he has rectified the effect of his misconduct under legal compulsion.<sup>1</sup> Nor, as a rule, can an attorney successfully defend on the ground of inexperience,<sup>2</sup> ignorance of the law,<sup>3</sup> or previous good reputa-

<sup>15</sup> *State v. Kirke*, 12 Fla. 278, 95 Am. Dec. 314.

<sup>16</sup> See *supra*, §§ 773-864.

<sup>17</sup> See *supra*, §§ 760-762.

<sup>18</sup> In *re Wellcome*, 23 Mont. 450, 59 Pac. 445; In *re Shoemaker*, 2 Pa. Super. Ct. 27, 38 W. N. C. 414, *affirming* 5 Pa. Dist. Ct. 161, 38 W. N. C. 54.

<sup>19</sup> In *re Platz*, (Utah) 132 Pac. 390.

<sup>20</sup> *People v. Payson*, 215 Ill. 476, 74 N. E. 383.

<sup>1</sup> *Matter of V.*, 10 App. Div. 491, 42 N. Y. S. 268.

And see *supra*, § 813.

<sup>2</sup> *People v. Macauley*, 230 Ill. 208, 82 N. E. 612, 120 Am. St. Rep. 287. Compare In *re Knott*, 71 Cal. 584, 12 Pac. 780. See also *supra*, § 815.

<sup>3</sup> *Ex p. Turner*, 49 Ore. 227, 89 Pac. 426; In *re Schull*, 25 S. D. 602, 127 N. W. 541, *modified* 26 S. D. 353, 128 N. W. 321. See also *supra*, § 776.

tion,<sup>4</sup> though any or all of these may be shown in connection with other evidence tending to rebut the accusations of misconduct. Nor can an attorney defend on the ground that he has settled with his client, or that the client does not wish to prosecute him, or has not complained against him;<sup>5</sup> and it is certainly no defense, where an attorney is shown to have defrauded his client in the first instance, to prove that the ultimate damage resulted to a third party.<sup>6</sup> So, an attorney is estopped to object that a fraud, charged as having been committed upon a client, was in fact a transaction occurring prior to his admission, where, in such latter case, he was guilty of a misdemeanor, under the local law, in falsely representing himself to be a licensed attorney.<sup>7</sup> It has also been held that while drunkenness is no defense in disbarment proceedings, it will, nevertheless, be taken into consideration as a mitigating circumstance, because the probability of reform is greater than where the wrong has been committed with deliberation.<sup>8</sup>

**§ 879. Where Criminal Misconduct Is Charged.** — Where criminal misconduct is alleged as a ground of disbarment,<sup>9</sup> it is no defense that the respondent may also be punished for a viola-

<sup>4</sup> *People v. Betts*, 26 Colo. 521, 58 Pac. 1091; *In re Darrow*, 175 Ind. 44, 92 N. E. 369; *In re Darrow*, (Ind.) 83 N. E. 1026; *Ex p. Cowing*, 26 Ore. 572, 38 Pac. 1090.

<sup>5</sup> *People v. Chamberlain*, 242 Ill. 260, 89 N. E. 994; *Com. v. Roe*, 129 Ky. 650, 112 S. W. 683, 19 L.R.A. (N.S.) 413; *In re Davies*, 13 Phila. (Pa.) 65, 36 Leg. Int. 434, 7 W. N. C. 506; *Ex p. Orwing*, 31 Leg. Int. (Pa.) 20; *In re Ramsey*, 24 S. D. 266, 123 N. W. 726.

See also *supra*, §§ 795-803. And as to defenses where an attorney is charged with the unlawful retention or misappropriation of his client's fund, see *supra*, §§ 810-815.

*The withdrawal of charges* may be allowed where sufficient cause there-

for is shown. *In re Jacobs*, 137 App. Div. 937, 122 N. Y. S. 475.

But a withdrawal of charges by a client is not a bar to further prosecution of the proceeding. See *In re Martin*, 6 Beav. (Eng.) 340; *Henau v. Montreal Bar*, 30 Can. Sup. Ct. 1; *Matter of Rockmore*, 130 App. Div. 586, 117 N. Y. S. 512.

<sup>6</sup> *In re Pascal*, 146 App. Div. 836, 131 N. Y. S. 823.

<sup>7</sup> *In re Elliott*, 18 S. D. 264, 100 N. W. 431. See also *supra*, § 842.

As to fraud in procuring admission to the bar, see *supra*, § 839; and as to misconduct outside of professional duties, see *supra*, §§ 849-852.

<sup>8</sup> *In re Evans*, 94 S. C. 414, 78 S. E. 227.

<sup>9</sup> See *supra*, §§ 853-864.

tion of the penal laws.<sup>10</sup> Nor can the respondent defend on the ground that the prosecuting attorney promised not to prosecute him further,<sup>11</sup> or that he turned state's evidence,<sup>12</sup> or that he has appealed from a conviction,<sup>13</sup> and in most instances even an acquittal of the respondent on the trial of the criminal prosecution will not constitute a defense in the disbarment proceedings.<sup>14</sup> In some states criminal misconduct, especially that which is entirely disconnected with an attorney's professional capacity, constitutes a ground for disbarment only when there has been a conviction thereof;<sup>15</sup> and the fact that there has been no such conviction would, of course, constitute a good defense in the disbarment proceedings. But conviction is not required as a general rule, especially where the criminal misconduct, irrespective of its aspect as a violation of the penal laws, is also unprofessional conduct.<sup>16</sup> And it has been held in one state that disbarment will not be ordered because of a conviction in another jurisdiction;<sup>17</sup> but the general rule is otherwise.<sup>18</sup> So, the court may take into consideration the fact that the respondent has been pardoned.<sup>19</sup>

**§ 880. Limitation and Laches.** — The statute of limitations does not constitute a bar to the prosecution of disbarment proceedings; nor will such proceedings be barred by mere laches.<sup>20</sup>

<sup>10</sup> See *supra*, § 853. See also Ex p. Tyler, 107 Cal. 78, 40 Pac. 33; *People v. Weeber*, 26 Colo. 229, 57 Pac. 1079.

<sup>11</sup> *People v. Hill*, 182 Ill. 425, 55 N. E. 542.

<sup>12</sup> *Matter of Boland*, 127 App. Div. 746, 111 N. Y. S. 932.

<sup>13</sup> See *supra*, § 862.

<sup>14</sup> See *supra*, § 864.

<sup>15</sup> See *supra*, § 860.

<sup>16</sup> See *supra*, § 861.

<sup>17</sup> *In re Ebbs*, 150 N. C. 44, 17 Ann. Cas. 592, 63 S. E. 190, 19 L.R.A. (N.S.) 892.

<sup>18</sup> See *supra*, § 859.

<sup>19</sup> See *supra*, § 863. See also N. Y. L. 1912, c. 253, *amending* § 88 (2) of the N. Y. Judiciary Law.

<sup>20</sup> *United States*.—U. S. v. Parks, 93 Fed. 414.

*California*.—*In re Lowenthal*, 78 Cal. 427, 21 Pac. 7; Ex p. Tyler, 107 Cal. 78, 40 Pac. 33.

*Illinois*.—*People v. Hooper*, 218 Ill. 313, 75 N. E. 896.

*Kansas*.—*In re Elliott*, 73 Kan. 151, 84 Pac. 750; *In re Smith*, 73 Kan. 743, 85 Pac. 584.

*Louisiana*.—*State v. Fourchy*, 106 La. 743, 31 So. 325.

*Montana*.—*In re Weed*, 26 Mont. 507, 68 Pac. 1115.

*New York*.—*In re Leonard*, 193 N. Y. 655, 87 N. E. 1121; *In re Leonard*, 127 App. Div. 493, 111 N. Y. S. 905.

Thus, disbarment may be ordered for criminal misconduct, although a prosecution of the crime is barred by the statute of limitations,<sup>1</sup> excepting, of course, where conviction is a prerequisite to disbarment.<sup>2</sup> But disbarment proceedings should not be instituted for misconduct which occurred many years before, especially where the respondent has lived an exemplary life thereafter.<sup>3</sup> And the fact that such proceedings have been delayed will be taken into consideration in mitigation of punishment,<sup>4</sup> and may result in a dismissal.<sup>5</sup> Thus, proceedings have been dismissed where they were commenced five,<sup>6</sup> seven,<sup>7</sup> eight,<sup>8</sup> and thirteen<sup>9</sup> years after the misconduct occurred.

**§ 881. Defensive Pleading.**— Having been notified of the disbarment proceedings, it is the duty of the respondent to plead thereto at the time specified therein;<sup>10</sup> he may demur,<sup>11</sup> or answer; and his answer may confess, explain, or deny the charges preferred against him. If he confesses, the court may at once

*North Dakota.*—In re Crum, 7 N. D. 316, 75 N. W. 257.

*South Dakota.*—In re Ramsey, 24 S. D. 266, 123 N. W. 726.

*West Virginia.*—State v. Hays, 64 W. Va. 45, 61 S. E. 355.

In a proceeding for disbarment upon charges of the publication of a pamphlet disrespectful to the court, the statute of limitations is not available as a defense, especially where the pamphlet remains in circulation until a time within what would be the limitation period if the statute of limitations be construed to apply. State Bar Commission v. Sullivan, 35 Okla. 745, 131 Pac. 703.

<sup>1</sup> See *supra*, § 861.

<sup>2</sup> See *supra*, § 860. See also State v. Fourchy, 106 La. 743, 31 So. 325.

<sup>3</sup> In re Elliott, 73 Kan. 151, 84 Pac. 750; In re Sherin, 27 S. D. 232, Ann. Cas. 1913D 446, 130 N. W. 761, 40 L.R.A.(N.S.) 801.

<sup>4</sup> In re Lowenthal, 78 Cal. 427, 21 Pac. 7; In re Aldrich, (Vt.) 86 Atl. 801.

<sup>5</sup> In re Hutson, 127 App. Div. 492, 111 N. Y. S. 731.

<sup>6</sup> State v. Clopton, 15 Mo. App. 589.

<sup>7</sup> People v. Allison, 68 Ill. 151.

<sup>8</sup> People v. Tanquary, 48 Colo. 122, 109 Pac. 260.

<sup>9</sup> People v. Coleman, 210 Ill. 79, 71 N. E. 693; In re Elliott, 73 Kan. 151, 84 Pac. 750.

<sup>10</sup> A defendant in a disbarment proceeding is not entitled to the time allowed to answer an ordinary summons, but may be cited to appear within any time that gives him a reasonable opportunity to be heard. In re Brown, 2 Okla. 590, 39 Pac. 469.

<sup>11</sup> Reilly v. Cavanaugh, 32 Ind. 214; State v. Martin, 45 Wash. 76, 87 Pac. 1054.

render judgment; and if he explains, it is for the court to say whether such explanation is sufficient;<sup>12</sup> if he denies the charges, a question is also raised for the determination of the court after the evidence has been taken.<sup>13</sup> An answer, whether by way of explanation or denial, should make a clear, full, and accurate statement of the facts.<sup>14</sup> But the failure to answer will not warrant the entry of an order of disbarment,<sup>15</sup> excepting where a record of conviction has been presented to the court,<sup>16</sup> and such record, in itself, warrants disbarment.<sup>17</sup> An improper answer may be stricken out;<sup>18</sup> but if it is merely evasive, the respondent will be given an opportunity to file a more specific answer.<sup>19</sup> The filing of an answer to the merits waives an objection to the form of the proceeding,<sup>20</sup> and to the fact that the complaint has not been examined by the court.<sup>1</sup> And where a respondent who was charged with having made false charges in disbarment proceedings against another attorney, answered that such alleged false charges were not filed solely because of ill will, it was held that he thereby admitted, by implication, that such charges were malicious in part.<sup>2</sup> A replication need not be filed to the answer.<sup>3</sup>

### *Hearing.*

**§ 882. Necessity of Hearing.** — An attorney can be deprived of the right to practice his profession only upon a judicial hearing on charges legally presented, and in which he is given a full and

<sup>12</sup> *In re Eldridge*, 82 N. Y. 161, 37 Am. Rep. 558 (see also mem. in 2 Ky. L. Rep. 75). Admission conclusive, *In re Newell*, 157 App. Div. 907, 142 N. Y. S. 185.

<sup>13</sup> *State v. Mosher*, 128 Ia. 82, 5 Ann. Cas. 984, 103 N. W. 105.

<sup>14</sup> *People v. Webster*, 28 Colo. 223, 64 Pac. 207.

The requirements as to setting forth the facts in an answer are practically the same as those required in the petition as stated *supra*, § 873.

<sup>15</sup> *Ex p. Robinson*, 19 Wall. 505, 22 U. S. (L. ed.) 205; *In re Walkey*, 26 Colo. 161, 56 Pac. 576.

<sup>16</sup> *People v. Adams*, 26 Colo. 412, 58 Pac. 603.

<sup>17</sup> See *supra*, § 858.

<sup>18</sup> *People v. Payson*, 210 Ill. 82, 71 N. E. 692. See also *In re Barnard*, 145 App. Div. 910, 129 N. Y. S. 939.

<sup>19</sup> *People v. Webster*, 28 Colo. 223, 64 Pac. 207.

<sup>20</sup> *Jackson v. State*, 21 Tex. 668.

<sup>1</sup> *State v. Mosher*, 128 Ia. 82, 5 Ann. Cas. 984, 103 N. W. 105.

<sup>2</sup> *In re Cooksey*, 79 Kan. 550, 100 Pac. 62.

<sup>3</sup> *State v. Maxwell*, 19 Fla. 31.

fair opportunity to be heard in his own defense.<sup>4</sup> Nor can disbarment be ordered in contempt proceedings,<sup>5</sup> or in any other arbitrary manner.<sup>6</sup> Nor is it proper for the court to deprive an attorney of the right to practice his profession pending the investigation and hearing in the disbarment proceedings.<sup>7</sup> There may, of course, be cases of such gross and outrageous conduct in open court on the part of an attorney, as to justify very summary proceedings for his suspension or removal from office; but even then he should be heard before he is condemned.<sup>8</sup> However, an attorney against whom charges have been made with a view to his disbarment is not entitled to be present at the sittings of a committee appointed by the court or a bar association, at which such charges are being investigated preliminary to a formal presentation thereof.<sup>9</sup> When facts warranting disbarment or suspension are ad-

<sup>4</sup> *United States*.—Ex p. Robinson, 19 Wall. 505, 22 U. S. (L. ed.) 205.

*Alabama*.—Withers v. State, 36 Ala. 252.

*Arkansas*.—Beene v. State, 22 Ark. 149.

*California*.—People v. Turner, 1 Cal. 143, 52 Am. Dec. 295; Fletcher v. Daingerfield, 20 Cal. 427.

*Connecticut*.—In re Durant, 80 Conn. 140, 10 Ann. Cas. 539, 67 Atl. 497.

*Indiana*.—Ex p. Smith, 28 Ind. 47; Heffren v. Jayne, 39 Ind. 463, 13 Am. Rep. 281.

*Iowa*.—State v. Start, 7 Ia. 499.

*Michigan*.—Warren v. Connolly, 165 Mich. 274, 130 N. W. 637, 33 L.R.A.(N.S.) 314, 18 Detroit Leg. N. 138.

*Missouri*.—Shackelford v. McElhinney, 241 Mo. 592, 145 S. W. 1139.

*New York*.—In re Eldridge, 82 N. Y. 161, 37 Am. Rep. 558 (see also mem. in 2 Ky. L. Rep. 75).

*North Dakota*.—State v. Root, 5 N. D. 487, 67 N. W. 596, 57 Am. St. Rep. 568.

*Pennsylvania*.—Ex p. Steinman, 95 Pa. St. 220, 40 Am. Rep. 637, reversing 8 W. N. C. 296.

*Virginia*.—In re Fisher, 6 Leigh 619.

*West Virginia*.—State v. Stiles, 48 W. Va. 425, 37 S. E. 620.

A judge in chambers has no power to suspend or disbar an attorney from practicing in the courts. State v. Nathans, 49 S. C. 199, 27 S. E. 52.

<sup>5</sup> People v. Turner, 1 Cal. 143, 52 Am. Dec. 295; State v. Root, 5 N. D. 487, 67 N. W. 590, 57 Am. St. Rep. 568; Ex p. Kearby, 35 Tex. Crim. 634, 34 S. W. 962; State v. Sachs, 2 Wash. 373, 26 Pac. 865, 26 Am. St. Rep. 857.

<sup>6</sup> See *supra*, § 866.

<sup>7</sup> State v. Goode, 4 Idaho 730, 44 Pac. 640.

<sup>8</sup> Ex p. Robinson, 19 Wall. 505, 22 U. S. (L. ed.) 205; Ex p. Wall, 107 U. S. 265, 2 S. Ct. 569, 27 U. S. (L. ed.) 552.

<sup>9</sup> State v. Fourchy, 106 La. 743, 31 So. 325.

mitted by the attorney in his pleadings, there is no necessity for taking testimony, and the court will render judgment without directing a hearing.<sup>10</sup>

§ 883. **Mode of Hearing.** — Disbarment proceedings are usually deemed to be of a civil nature;<sup>11</sup> and, therefore, a hearing therein is governed by the rules which apply to the trial of other civil proceedings.<sup>12</sup> In many jurisdictions the mode of hearing is fixed by statute; but, in the absence of such regulation, the court may determine the manner in which the hearing shall be conducted.<sup>13</sup> Whether regulated by statute or not, it is customary to order a reference of the issues raised for the purpose of taking testimony, and reporting thereon;<sup>14</sup> but the evidence must be examined by the court before the order of disbarment is entered.<sup>15</sup> And the conclusions of a committee in a disbarment proceeding will ordinarily be accepted by the court. So, where the report of such a committee negatived the impropriety of an agreement for contingent fees in the particular circumstances, its conclusion would not

<sup>10</sup> *Matter of Pritchett*, 122 App. Div. 8, 106 N. Y. S. 847; *Matter of Schapiro*, 144 App. Div. 1, 128 N. Y. S. 852.

This will be done, of course, when the attorney asks that the case be decided on the admitted facts. In *re Kallenburgh*, 115 App. Div. 346, 101 N. Y. S. 507, 188 N. Y. 49, 80 N. E. 570; In *re Shay*, 133 App. Div. 547, 118 N. Y. S. 146, *affirmed* 196 N. Y. 530, 89 N. E. 1112.

<sup>11</sup> See *supra*, § 867.

<sup>12</sup> *People v. Amos*, 246 Ill. 299, 92 N. E. 857, 138 Am. St. Rep. 239.

<sup>13</sup> *Ex p. Wall*, 107 U. S. 265, 2 S. Ct. 569, 27 U. S. (L. ed.) 552; *Fairfield County Bar v. Taylor*, 60 Conn. 11, 22 Atl. 441, 13 L.R.A. 767.

<sup>14</sup> *People v. Mead*, 29 Colo. 344, 68 Pac. 241; In *re Eldridge*, 82 N. Y. 161, 37 Am. Rep. 558 (see also mem. in 2 Ky. L. Rep. 75); In *re Stern*,

137 App. Div. 909, 121 N. Y. S. 948; In *re Barnard*, 145 App. Div. 910, 129 N. Y. S. 939.

In Vermont the charges are referred to commissioners chosen from members of the bar, whose conclusions, when reported to the court, are treated as the verdict of a jury. In *re Jones*, 70 Vt. 71, 39 Atl. 1087.

<sup>15</sup> In *re Chandler*, 105 Mich. 235, 63 N. W. 69.

*The Alaska Pol. Code*, § 750, providing for reference to three disinterested attorneys of proceedings for disbarment and suspension of an attorney, for misconduct, is confined to cases where the accusation is made on the knowledge of the court or judge thereof, and is inapplicable to proceedings instituted on the information of a third person, as authorized by section 744. *Cobb v. U. S.*, 172 Fed. 641, 96 C. C. A. 477.

be disturbed.<sup>16</sup> In some jurisdictions, however, it is held that the court cannot delegate to another the power to examine witnesses in disbarment proceedings, but that it must, itself, conduct such examination, so that the judge "may observe the manner of the witnesses, and may give to their evidence credence or disbelief, as a jury does, according as their manner of testifying may indicate prejudice, malice or other sinister motive to subserve."<sup>17</sup> And in another case it was said that, in proceedings for disbarment, it is not safe to rely upon testimony taken before a referee or master, or any other tribunal; but the court should hear the witnesses in the presence of the respondent. In such proceedings the court decides the issues of fact as well as of law, and to do so satisfactorily and in justice and fairness to the attorney accused, the same opportunity should be given which is given to a jury to determine the credibility of witnesses by observing their demeanor as well as by hearing what they say.<sup>18</sup> So, it has been held that the court should separate the witnesses, on request, in disbarment proceedings.<sup>19</sup> But where an attorney, who was charged with misconduct in practicing before the patent office, had a full hearing before the commissioner of patents, it is not an essential part of such hearing that he should be permitted to present arguments before the secretary of the interior, to whom the commissioner of patents had reported, in person.<sup>20</sup> It has been held that it is not error to refuse a separate trial where two or more attorneys have been joined as respondents in disbarment proceedings;<sup>1</sup> and in such case there may be a conviction or acquittal as to one only.<sup>2</sup> A change of venue may be allowed in disbarment proceedings for the same reasons, and upon compliance with the same rules, as prevail in ordinary civil actions.<sup>3</sup>

<sup>16</sup> *In re Aldrich*, (Vt.) 86 Atl. 801.

<sup>17</sup> *State v. Finley*, 30 Fla. 325. 11 So. 674, 18 L.R.A. 401.

In Kansas proceedings for disbarment are required by statute to be heard by the court. *In re Smith*, 73 Kan. 743, 85 Pac. 584.

<sup>18</sup> *In re Duncan*, 64 S. C. 461, 42 S. E. 433.

<sup>19</sup> *Walker v. Com.*, 8 Bush (Ky.) 86.

<sup>20</sup> *U. S. v. Bliss*, 12 App. Cas. (D. C.) 485.

<sup>1</sup> *In re Darrow*, 175 Ind. 44, 92 N. E. 369.

<sup>2</sup> *In re Wilson*, 79 Kan. 450, 100 Pac. 75.

<sup>3</sup> *Slemmer v. Wright*, 46 Ia. 705; *In re Peyton*, 12 Kan. 398.



§ 884. **Right to Trial by Jury.** — It is well settled that in the absence of clear statutory provision, the respondent in disbarment proceedings is not entitled, as a matter of right, to a jury trial;<sup>4</sup> but the court may, should it see fit to do so, order a jury trial. And it seems that where an attorney is charged with misconduct outside the scope of his professional relations with the court and his clients,<sup>5</sup> a trial by jury should be allowed. Thus, where disbarment proceedings were predicated on the publication of a libel concerning a public official, it was held that the respondent was entitled, before he might be disbarred, to the judgment of his peers according to the law of the land; but in that case it appears that the state constitution provided that "no conviction shall be had in any prosecution for the publication of papers relating to the official conduct of officers or men in public capacity, or to any other matter proper for public investigation or information, where the fact that such publication was not maliciously or negligently made, shall be established to the satisfaction of the jury."<sup>6</sup>

§ 885. **Qualification of Judge.** — The rule applicable to ordinary civil suits applies here also. And it has been held that a proceeding to disbar an attorney, instituted by a bar association organized to insure conformity to a high standard of professional

<sup>4</sup> *United States*.—Ex p. Wall, 107 U. S. 265, 2 S. Ct. 569, 27 U. S. (L. ed.) 552.

*Connecticut*.—In re Durant, 80 Conn. 140, 10 Ann. Cas. 539, 67 Atl. 497.

*Florida*.—State v. McRae, 49 Fla. 389, 6 Ann. Cas. 580, 38 So. 605.

*Indiana*.—Ex p. Robinson, 3 Ind. 52. But see Reilly v. Cavanaugh, 32 Ind. 214.

*Kansas*.—In re Norris, 60 Kan. 649, 57 Pac. 528.

*Louisiana*.—State v. Fourchy, 106 La. 743, 31 So. 325. *Contra* Chevalon v. Schmidt, 11 Rob. 91; Turner v. Walsh, 12 Rob. 383.

*Michigan*.—In re Shepard, 109 Mich. 631, 67 N. W. 971.

*New York*.—Burr's Case, 1 Wheel. Crim. 503.

*Oklahoma*.—Dean v. Stone, 2 Okla. 13, 35 Pac. 578; State Bar Commission v. Sullivan, 35 Okla. 745, 131 Pac. 703.

*Pennsylvania*.—In re Gates, 17 W. N. C. 142, 2 Atl. 214.

*Tennessee*.—Smith v. State, 1 Yerg. 228.

*Washington*.—State v. Rossman, 53 Wash. 1, 17 Ann. Cas. 625, 101 Pac. 357, 21 L.R.A.(N.S.) 821.

<sup>5</sup> See *supra*, §§ 849-852.

<sup>6</sup> Ex p. Steinman, 95 Pa. St. 220, 40 Am. Rep. 637, *reversing* 8 W. N. C. 296.

duty, is a proceeding within the exercise of the jurisdiction of the court over an officer for the maintenance of the purity of the court by removing an unfit person, and that such association is not a party thereto, though the proceeding is entitled in its name, and that judges who are honorary members of the association are not disqualified from hearing and determining charges so preferred.<sup>7</sup>

### *Evidence.*

§ 886. **Generally.** — The ordinary rules of evidence are applicable in proceedings for disbarment, and an order of disbarment or suspension will be entered only upon satisfactory proof;<sup>8</sup> and

<sup>7</sup>Ex p. State Bar Assoc. 92 Ala. 113, 8 So. 768, 12 L.R.A. 134; Bar Association v. Casey. 211 Mass. 187, Ann. Cas. 1913A 1226, 97 N. E. 751, 39 L.R.A.(N.S.) 116; In re Bowman, 67 Mo. 146.

<sup>8</sup>The competency of witnesses, and the admissibility and weight of evidence, are discussed in the following cases:

*United States.*—In re Boone, 83 Fed. 944.

*California.*—In re Luce, 83 Cal. 303, 23 Pac. 350; In re Barnes, 16 Pac. 896.

*Colorado.*—People v. Benson, 24 Colo. 358, 51 Pac. 481; People v. Keegan, 30 Colo. 71, 69 Pac. 524; People v. Kelsey, 32 Colo. 1, 75 Pac. 390; People v. Essington, 32 Colo. 168, 75 Pac. 394; People v. Robinson, 32 Colo. 241, 75 Pac. 922; People v. Johnson, 40 Colo. 460, 90 Pac. 1038.

*District of Columbia.*—In re Adriaans, 28 App. Cas. 515.

*Florida.*—State v. Young, 30 Fla. 85, 11 So. 514; Zachary v. State, 53 Fla. 94, 43 So. 925.

*Illinois.*—People v. Moutray, 166 Ill. 639, 47 N. E. 79; People v. Shirley, 211 Ill. 112, 73 N. E. 303;

People v. Gilmore, 214 Ill. 569, 73 N. E. 737, 69 L.R.A. 701; People v. Frisch, 218 Ill. 275, 75 N. E. 904; People v. Brown, 218 Ill. 301, 75 N. E. 907; People v. Sullivan, 218 Ill. 419, 75 N. E. 1005; People v. Reaugh, 224 Ill. 541, 79 N. E. 936; People v. Stirlen, 224 Ill. 636, 79 N. E. 969; People v. Keithley, 225 Ill. 30, 80 N. E. 50; People v. Thornton, 228 Ill. 42, 81 N. E. 793; People v. Knefel, 233 Ill. 133, 84 N. E. 172; People v. Barrios, 237 Ill. 527, 86 N. E. 1075; People v. Maloney, 240 Ill. 96, 88 N. E. 287; People v. Chamberlain, 242 Ill. 260, 89 N. E. 994; People v. Allen, 244 Ill. 393, 91 N. E. 463; People v. Amos, 246 Ill. 299, 92 N. E. 857, 138 Am. St. Rep. 239; People v. Adams, 249 Ill. 524, 94 N. E. 950; People v. Olson, 258 Ill. 283, 101 N. E. 521.

*Indiana.*—Ex p. Walls, 64 Ind. 461.

*Iowa.*—State v. Howard, 112 Ia. 256, 83 N. W. 975; State v. Mosher, 128 Ia. 82, 5 Ann. Cas. 984, 103 N. W. 105; State v. Johnson, 149 Ia. 462, 128 N. W. 837.

*Kansas.*—In re Burnette, 70 Kan. 229, 78 Pac. 410; In re Smith, 73 Kan. 743, 85 Pac. 584; In re Wil-

this has been held to be true even where the respondent makes default.<sup>9</sup> The court should never disbar a lawyer on testimony of a

son, 79 Kan. 674, 17 Ann. Cas. 690, 100 Pac. 635, 21 L.R.A.(N.S.) 517; In re Wileox, 133 Pac. 547.

*Kentucky*.—Tudor v. Com., 84 S. W. 522, 27 Ky. L. Rep. 87; Underwood v. Com., 105 S. W. 151, 32 Ky. L. Rep. 32.

*Louisiana*.—State v. Fourchy, 106 La. 743, 31 So. 325.

*Massachusetts*.—Bar Assoc. of Boston v. Casey, 196 Mass. 100, 81 N. E. 892; Bar Assoc. of Boston v. Hale, 197 Mass. 423, 83 N. E. 885.

*Minnesota*.—Southworth v. Bearnes, 88 Minn. 31, 92 N. W. 466; State Board of Examiners v. Byrnes, 93 Minn. 131, 100 N. W. 645; State Board of Examiners v. Dodge, 93 Minn. 160, 100 N. W. 684; State Board of Examiners v. Byrnes, 100 Minn. 76, 110 N. W. 341.

*Missouri*.—In re Disbarment of Lyons, 162 Mo. App. 688, 145 S. W. 844.

*Montana*.—In re Baum, 10 Mont. 225, 25 Pac. 99; State v. Cadwell, 16 Mont. 119, 40 Pac. 176; In re Carleton, 33 Mont. 431, 84 Pac. 788, 114 Am. St. Rep. 826.

*Nebraska*.—State v. Fisher, 82 Neb. 361, 117 N. W. 882, *affirmed on rehearing* 82 Neb. 367, 119 N. W. 249.

*New Mexico*.—In re Catron, 8 N. M. 253, 43 Pac. 724.

*New York*.—In re ———, 86 N. Y. 563; In re Randel, 158 N. Y. 216, 52 N. E. 1106; In re Dunn, 27 App. Div. 371, 50 N. Y. S. 163; Metropolitan St. R. Co. v. Oppenheim, 58 App. Div. 510, 69 N. Y. S. 524; In re Clark, 108 App. Div. 150, 95 N. Y. S. 388, *affirmed* 184 N. Y. 222, 77 N. E. 1; In re Nekarda, 114 App. Div.

370, 100 N. Y. S. 42, *affirmed* 188 N. Y. 590, 81 N. E. 1170; In re Hart, 131 App. Div. 661, 116 N. Y. S. 193; In re Hardenbrook, 135 App. Div. 634, 121 N. Y. S. 250, *affirmed* 199 N. Y. 539, 92 N. E. 1086; In re Rosenthal, 137 App. Div. 772, 122 N. Y. S. 471; In re Harding, 139 App. Div. 482, 125 N. Y. S. 264; In re Lowy, 140 App. Div. 537, 125 N. Y. S. 777; In re Greenstein, 140 App. Div. 547, 125 N. Y. S. 791; In re Prinstein, 142 App. Div. 807, 127 N. Y. S. 629; In re Harrington, 146 App. Div. 219, 130 N. Y. S. 920, *denying rehearing* 140 App. Div. 939, 125 N. Y. S. 1123.

*North Dakota*.—In re Whittemore, 14 N. D. 487, 105 N. W. 232; In re Maloney, 21 N. D. 157, 129 N. W. 74.

*Oregon*.—Ex p. Miller, 37 Ore. 304, 60 Pac. 999; Ex p. Eastham, 46 Ore. 475, 80 Pac. 1057; Ex p. St. Rayner, 70 Pac. 537.

*Pennsylvania*.—In re Smith, 179 Pa. St. 14, 36 Atl. 134; In re Smith, 2 Lack. Leg. N. 152.

*South Carolina*.—In re Duncan, 81 S. C. 290, 62 S. E. 406; In re Gadsden, 89 S. C. 352, 71 S. E. 952.

*South Dakota*.—In re Egan, 22 S. D. 355, 117 N. W. 874; In re Harben, 27 S. D. 31, 129 N. W. 561.

*Tennessee*.—Benton v. Henry, 2 Colo. 83.

*Vermont*.—In re Jones, 70 Vt. 71, 39 Atl. 1087.

*Wisconsin*.—Flanders v. Keefe, 108 Wis. 441, 84 N. W. 878.

*West Virginia*.—State v. Stiles, 48 W. Va. 425, 37 S. E. 620.

<sup>9</sup> Ex p. Robinson, 19 Wall. 505, 22 U. S. (L. ed.) 205; In re Walkey, 26 Colo. 161, 56 Pac. 576.

doubtful character.<sup>10</sup> But the charges should be clearly sustained,<sup>11</sup> by convincing proof,<sup>12</sup> and a fair preponderance of the evidence.<sup>13</sup> And in some cases it has been held that there must be more than a preponderance of the evidence;<sup>14</sup> and that the proof must satisfy the court with reasonable certainty.<sup>15</sup> But the rule, applicable in criminal prosecutions, which requires proof beyond a reasonable doubt, does not apply in disbarment proceedings.<sup>16</sup> It has also been held that a judge's own observation may not only be sufficient to originate his jurisdiction over a case of unprofessional conduct on the part of an attorney, but that it may also be sufficient to authorize whatever judgment he may pronounce; and that the knowledge of the court, so obtained, cannot be contradicted by witnesses.<sup>17</sup>

**§ 887. Allegations and Proof.** — As in other proceedings, the proof must agree with the allegations; otherwise disbarment will

<sup>10</sup> *People v. Harvey*, 41 Ill. 277; *People v. Barker*, 56 Ill. 299; *People v. Silha*, 252 Ill. 385, 96 N. E. 826; *Tudor v. Com.*, 84 S. W. 522, 27 Ky. L. Rep. 87; *In re Moffett*, 154 App. Div. 929, 139 N. Y. S. 545.

<sup>11</sup> *Colorado*.—*People v. Robinson*, 32 Colo. 241, 75 Pac. 922.

*Illinois*.—*People v. Barker*, 56 Ill. 299; *People v. Matthews*, 217 Ill. 94, 75 N. E. 444; *People v. Silha*, 252 Ill. 385, 96 N. E. 826.

*Michigan*.—*In re Clink*, 117 Mich. 619, 76 N. W. 1, 5 Detroit Leg. N. 327.

*New York*.—*In re ———*, 1 Hun 321.

*West Virginia*.—*State v. Shumate*, 48 W. Va. 359, 37 S. E. 618; *State v. Stiles*, 48 W. Va. 425, 37 S. E. 620.

<sup>12</sup> *California*.—*In re Houghton*, 67 Cal. 511, 8 Pac. 52.

*Colorado*.—*People v. Pendleton*, 17 Colo. 544, 30 Pac. 1041; *People v. Tanquary*, 48 Colo. 122, 109 Pac. 260.

*Iowa*.—*State v. Rohrig*, 139 N. W. 908.

*Michigan*.—*In re Wool*, 36 Mich. 299.

*New Jersey*.—*In re Noonan*, 65 N. J. L. 142, 46 Atl. 570.

<sup>13</sup> *In re Darrow*, 175 Ind. 44, 92 N. E. 369; *State Bar Commission v. Sullivan*, 35 Okla. 745, 131 Pac. 703; *In re Sherin*, 27 S. D. 232, Ann. Cas. 1913D 446, 130 N. W. 761.

<sup>14</sup> *In re Bowman*, 7 Mo. App. 569; *In re Evans*, 22 Utah 366, 62 Pac. 913, 83 Am. St. Rep. 794, 53 L.R.A. 952.

<sup>15</sup> *State v. Wines*, 21 Mont. 464, 54 Pac. 562.

<sup>16</sup> *In re Wellcome*, 23 Mont. 450, 59 Pac. 445.

*Compare In re Mashbir*, 44 App. Div. 632, 7 N. Y. Ann. Cas. 1, 60 N. Y. S. 451, wherein it was held that charges of grave malpractice should be established beyond a reasonable doubt.

<sup>17</sup> *Bradley v. Fisher*, 7 D. C. 32, *affirmed* 13 Wall. 335, 20 U. S. (L. ed.) 646.

not be ordered.<sup>18</sup> And where an attorney is charged with specific misconduct, it is not permissible to show other similar offenses, except to prove knowledge,<sup>19</sup> though acts before admission which tended to show lack of integrity have been held material.<sup>20</sup> Proof of other misconduct will not justify disbarment, if the misconduct alleged is not proven;<sup>1</sup> but the court may permit the filing of amended or supplementary charges.<sup>2</sup> The accusations need not, of course, be proved exactly as alleged,<sup>3</sup> especially where the respondent is advised of the charges against him and as to which proof is offered,<sup>4</sup> for the technical nicety of the criminal law is not applicable to disbarment proceedings, in which the court inquires into the conduct of its own officers.<sup>5</sup>

**§ 888. Presumptions.** — An attorney, against whom disbarment proceedings have been preferred, is presumed to be innocent, and to have performed his duties faithfully and in accordance with his oath, until the contrary is established.<sup>6</sup> But the intention with which an act is done may be presumed from the act itself; thus, where it was shown that a respondent had wrongfully forged an affidavit, it was presumed, in the absence of proof to the contrary, that he did so intentionally;<sup>7</sup> and language derogatory of a court is presumed to have been used in its natural and ordinary

<sup>18</sup> *California*.—In re Luce, 83 Cal. 303, 23 Pac. 350.

*Colorado*.—People v. Goddard, 11 Colo. 259, 18 Pac. 338.

*Connecticut*.—Grievance Committee v. Ennis, 84 Conn. 594, 80 Atl. 767.

*District of Columbia*.—Garfield v. U. S., 32 App. Cas. 153.

*Illinois*.—People v. Allison, 68 Ill. 151.

*Utah*.—In re Evans, 130 Pac. 217.

<sup>19</sup> In re Evans, (Utah) 130 Pac. 217.

<sup>20</sup> In re Platz, (Utah) 132 Pac. 390.

<sup>2</sup> See *supra*, § 875, note

<sup>3</sup> Bar Assoc. of Boston v. Greenhood, 168 Mass. 169, 46 N. E. 568.

<sup>4</sup> Bar Assoc. of Boston v. Scott, 209 Mass. 200, 95 N. E. 402.

<sup>5</sup> See *supra*, § 873.

<sup>6</sup> In re Haymond, 121 Cal. 385, 53 Pac. 899; In re Parsons, 35 Mont. 478, 90 Pac. 163; In re Newby, 82 Neb. 235, 117 N. W. 691; In re Gadsden, 89 S. C. 352, 71 S. E. 952. Compare People v. Webster, 28 Colo. 223, 64 Pac. 207; In re Spenser, 143 App. Div. 229, 128 N. Y. S. 168.

<sup>7</sup> Ex p. Walls, 64 Ind. 461.

<sup>1</sup> Ex p. Bradley, 7 Wall. 364, 19 U. S. (L. ed.) 214; People v. Matthews, 217 Ill. 94, 75 N. E. 444.

significance, notwithstanding a disavowal of contemptuous intent by the respondent.<sup>8</sup>

**§ 889. Evidence of Accomplice.**—The rule that one accused of crime cannot be convicted on the uncorroborated evidence of an accomplice, does not extend to disbarment proceedings predicated on criminal misconduct on the part of the respondent; but the extent to which corroboration is necessary in such a proceeding is for the determination of the court in each case. And where it is asserted that an attorney, knowing that his client sought to recover on perjured testimony, continued the suit and insisted on a verdict, the testimony of such client need not be corroborated as to every fact or circumstance which tends to establish the respondent's guilt; but it will be sufficient if it is so corroborated as to connect the respondent with the commission of such misconduct, and this may be shown by the fact that he continued to prosecute the action.<sup>9</sup> But the testimony of a witness whom an attorney was charged with having bribed, is not sufficient to sustain the charge, where several other persons, who were present at the time of the alleged bribery, testified that no bribe was offered.<sup>10</sup>

**§ 890. Affidavits and Depositions.**—The respondent, in disbarment proceedings, is entitled to confront the witnesses, and to subject them to cross-examination;<sup>11</sup> and the contents of affidavits which have been filed as a basis for the commencement of the proceedings, cannot be considered as evidence in support of the accusations on the trial of the issue.<sup>12</sup> But disbarment proceedings do not partake of the nature of a criminal prosecution;<sup>13</sup> and, therefore, it has been held that depositions may be read in evidence on the hearing thereof,<sup>14</sup> providing, of course, that they are other-

<sup>8</sup> See *supra*, § 784.

<sup>9</sup> In *re* Hardenbrook, 135 App. Div. 634, 121 N. Y. S. 250, *affirmed* 199 N. Y. 539, 92 N. E. 1086.

<sup>10</sup> *Walker v. State*, 4 W. Va. 749.

<sup>11</sup> In *re* Eldridge, 82 N. Y. 161, 37 Am. Rep. 558 (See also *mem.* in 2 Ky. L. Rep. 75).

<sup>12</sup> In *re* Burnette, 70 Kan. 229, 78

Pac. 440; In *re* Eldridge, 82 N. Y. 161, 37 Am. Rep. 558, 2 Ky. L. Rep. 75; In *re* Simpson, 9 N. D. 379, 83 N. W. 541.

<sup>13</sup> See *supra*, § 867.

<sup>14</sup> *United States*.—See *Ex p. Burr*, 2 Cranch (C. C.) 391, 1 Wheel. Crim. (N. Y.) 503, 4 Fed. Cas. No. 2,186. *Connecticut*.—In *re* Durant, 80

wise competent.<sup>15</sup> In some jurisdictions, however, depositions are not admissible, over objection, in disbarment proceedings;<sup>16</sup> and in other states it has been held that the evidence cannot be taken before a referee or commissioner, on the theory that the court should see and hear the witnesses personally.<sup>17</sup> But the right to meet the witnesses face to face is a personal one, which the respondent may waive.<sup>18</sup>

**§ 891. Records and Proceedings in Other Actions and Courts.**—A record showing the disbarment of the respondent in another jurisdiction, or in another court within the same jurisdiction, is competent evidence against him, but it is not conclusive; and disbarment will be ordered, as a general rule, only as the result of an independent investigation.<sup>19</sup> But the court will not examine the evidence taken in another state to determine whether the respondent should be disbarred upon the case there presented.<sup>20</sup> In like manner, the records of other actions may be offered in evidence in disbarment proceedings where they tend to establish the charges preferred.<sup>1</sup> In some jurisdictions, however, the record

Conn. 140, 10 Ann. Cas. 539, 67 Atl. 497.

*Florida*.—State v. McRae, 49 Fla. 389, 6 Ann. Cas. 580, 38 So. 605.

*Iowa*.—State v. Mosher, 128 Ia. 82, 5 Ann. Cas. 984, 103 N. W. 105.

*Kansas*.—See In re Burnette, 73 Kan. 609, 85 Pac. 575.

*Montana*.—In re Wellcome, 23 Mont. 140, 259, 58 Pac. 45, 711.

<sup>15</sup> Garfield v. U. S., 32 App. Cas. (D. C.) 109.

<sup>16</sup> In re Eldridge, 82 N. Y. 161, 37 Am. Rep. 558; In re Attorney, 83 N. Y. 164, 23 Alb. L. J. 129.

<sup>17</sup> See *supra*, § 883.

<sup>18</sup> In re ———, 86 N. Y. 563.

<sup>19</sup> Bradley v. Fisher, 13 Wall. 335, 20 U. S. (L. ed.) 646; Ex p. Tillinghast, 4 Pet. 108, 7 U. S. (L. ed.) 798; In re Thatcher, 190 Fed. 969; In re Joseph, 125 App. Div. 544, 109

N. Y. S. 1018; In re Orwig, 1 W. N. C. (Pa.) 148.

*Compare* People v. Hill, 182 Ill. 425, 55 N. E. 542, wherein it was held that a judgment of the circuit court disbarring an attorney, is conclusive against him in subsequent proceedings to disbar him in the supreme court on the same charges. See also People v. Miller, 195 Ill. 621, 63 N. E. 504.

<sup>20</sup> In re Baum, 10 Mont. 223, 25 Pac. 99.

<sup>1</sup> People v. O'Brien, 196 Ill. 250, 63 N. E. 667; People v. Amos, 246 Ill. 299, 92 N. E. 857, 138 Am. St. Rep. 239; State v. Stringfellow, 128 La. 463, 54 So. 943; In re Ebbs, 150 N. C. 44, 17 Ann. Cas. 592, 63 S. E. 190, 19 L.R.A.(N.S.) 892; State v. Chapman, 11 Ohio 430. *Compare* Dillon v.

of conviction of certain criminal misconduct, in itself, warrants disbarment.<sup>2</sup>

**§ 892. Failure of Respondent to Testify.**—A proceeding for disbarment is not a criminal prosecution in the sense that the respondent's failure to testify shall not be used to his prejudice.<sup>3</sup> His failure to explain incriminating facts will be considered in connection with the other evidence presented,<sup>4</sup> and his refusal to testify will give rise to a presumption of the truth of facts which are fairly established by the evidence and which must have been known to him.<sup>5</sup> But the mere fact that the respondent has refused to testify does not, of course, dispense with the necessity of proving the accusations made against him; his innocence remains until it appears with reasonable certainty that he is guilty, and it then becomes incumbent on him to rebut such proof.<sup>6</sup>

*Findings, Verdict, Judgment and Punishment.*

**§ 893. In General.**—The findings in a disbarment case, as in other civil actions or proceedings, must be consistent with each other and must be based on competent evidence.<sup>7</sup> Where there are several charges against an attorney, the finding or judgment against him should specify the particular charge or charges upon which

State, 6 Tex. 55; In re Evans, (Utah) 130 Pac. 217.

<sup>2</sup> See *supra*, § 858.

<sup>3</sup> In re Wellcome, 23 Mont. 450, 59 Pac. 445; In re Randel, 158 N. Y. 216, 52 N. E. 1106.

<sup>4</sup> In re Burnette, 73 Kan. 609, 85 Pac. 575.

<sup>5</sup> In re Randel, 158 N. Y. 216, 52 N. E. 1106.

<sup>6</sup> In re Wellcome, 23 Mont. 450, 59 Pac. 445.

<sup>7</sup> An information to disbar attorneys, charged them with entering into a champertous contract. The referee did not find that the contract was champertous, and the court approved the findings as supported by the evi-

dence, and made an additional finding, based on the legal fiction of admission by demurrer in a civil action against the attorneys, in which they demurred to the complaint; and such additional finding was not only at variance with the findings of the referee, but was inconsistent with other additional findings of the court, disclosing facts showing that the contract was not champertous. Held, that the judgment of disbarment entered thereon was void. In re Evans, (Utah) 130 Pac. 217, vacating, on rehearing, judgment of disbarment in 22 Utah 366, 62 Pac. 913, 83 Am. St. Rep. 794, 53 L.R.A. 952.



his guilt is pronounced, so that if he is found guilty of only part of the charges, it may not appear that he was guilty of all.<sup>8</sup> On the other hand, it is ordinarily sufficient that the guilt of the attorney appear from an inspection of the final order or judgment when read with the charge in the petition or other formal accusation; and in such a case the final order in judgment need only recite that the application for disbarment is granted.<sup>9</sup> A variance that might be fatal to the prosecution in a criminal case is not necessarily important in a disbarment proceeding, and it is not a valid ground of objection that the findings do not exactly conform to the specifications. So when the facts found, with the inferences that may be drawn from them, warrant a finding that the accused attorney was guilty of deceit and gross misconduct in his office, it is immaterial that, in making his findings of fact, the judge has not attempted to make a complete analysis of the conduct described, or to state all the particulars in which it was culpable.<sup>10</sup> Whether or not the rule of criminal procedure that a special verdict must find all the facts and circumstances essential to constitute the offense, applies with full force to a disbarment proceeding, it is obvious that in jurisdictions where the practice prevails of trying disbarment cases by jury, a special verdict in such a case must be sufficiently specific and comprehensive to establish the attorney's guilt.<sup>11</sup> In disbarment proceedings, as in all civil actions, the court may direct a verdict where the evidence is uncontroverted;<sup>12</sup> hence where the uncontroverted evidence shows grounds for disbarment, the attorney cannot complain because the

<sup>8</sup> *Perry v. State*, 3 G. Greene (Ia.) 550.

In Missouri the statute requires that the precise cause for suspending an attorney must appear in the order of suspension. *State v. Watkins*, 3 Mo. 480.

<sup>9</sup> *State v. Howard*, 112 Ia. 256, 83 N. W. 975; *In re Shepard*, 109 Mich. 631, 67 N. W. 971.

<sup>10</sup> *Bar Assoc. of Boston v. Greenhood*, 168 Mass. 169, 46 N. E. 568.

<sup>11</sup> *Jackson v. State*, 21 Tex. 668, holding that no judgment disbarring

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an attorney can be given upon a special verdict "that the defendant was retained as an attorney at law by B. in the case of A. v. B. before the said defendant was retained by said A.:" it not appearing that the defendant was ever retained by A., or that he acted from a corrupt motive, and not from inadvertence, or some justifiable cause.

<sup>12</sup> *Wernimont v. State*, 101 Ark. 210, Ann. Cas. 1913D 1156, 142 S. W. 194.

court discharges the jury and itself makes findings and renders judgment of disbarment.<sup>13</sup> In the absence of an enabling statute, a court has no power, in a proceeding for the suspension or disbarment of an attorney, to render judgment against him for money that he has misappropriated,<sup>14</sup> though it has been held that he may be suspended until he makes restitution.<sup>15</sup> A judgment of disbarment or suspension, rendered by a court of competent jurisdiction, cannot be attacked in a collateral proceeding.<sup>16</sup> On the other hand, when a final judgment or order has been rendered in the attorney's favor, he is protected by the principle of *res judicata* from further disbarment proceedings based on the same charges.<sup>17</sup> Under some statutes a disbarred or suspended attorney desiring a modification of the decree of suspension or removal, may file a written motion therefor with the court which entered the decree; and if the court is satisfied that he has reformed and is a fit subject for clemency, it will reconsider and modify the decree.<sup>18</sup> A judgment of disbarment may be modified to one of suspension for a short period if it be made to appear to the court that the attorney has become genuinely repentant and may be a fit person to practice law; and this may be done notwithstanding a previous refusal of an application for his reinstatement.<sup>19</sup> After judgment of disbarment has been affirmed on appeal and the *remittitur* issued, application to modify it should be made to the trial court.<sup>20</sup>

**§ 894. Punishment.** — The grounds for disbarment or suspension have been heretofore discussed,<sup>1</sup> and need not be further noticed in this connection. Having determined that the misconduct

<sup>13</sup> *Wernimout v. State*, 101 Ark. 210, Ann. Cas. 1913D 1156, 142 S. W. 194.

<sup>14</sup> *Dawson v. Compton*, 7 Blackf. (Ind.) 421.

Under Indiana Code, § 778, on a motion to suspend an attorney, a judgment may be rendered against him for the amount of money withheld by him from the moving party, as alleged in the motion. *Reilly v. Cavanaugh*, 32 Ind. 214.

<sup>15</sup> See *infra*, § 894.

<sup>16</sup> *Philbrook v. Newman*, 85 Fed. 139; *Smith v. State*, 5 Tex. 578.

<sup>17</sup> *Com. v. McKay*, (Ky.) 20 S. W. 276; *In re Houghton*, 9 S. D. 457, 70 N. W. 634.

<sup>18</sup> *In re Burke*, 11 Ohio Cir. Dec. 397, 21 Ohio Cir. Ct. 34.

<sup>19</sup> *In re Egan*, 27 S. D. 16, 129 N. W. 365.

<sup>20</sup> *In re Wharton*, 130 Cal. 486, 62 Pac. 741.

<sup>1</sup> See *supra*, §§ 773-864.

of an attorney merits discipline, the court is confronted with the question of the character and extent of the punishment that should be inflicted. Unless the act of the attorney is one for which disbarment is made a penalty by a mandatory statute, the solution of this question frequently involves so many considerations of public policy and concrete justice, dependent upon the gravity and consequences of the misconduct, the age, character and reputation of the attorney, the probability of his reformation, the circumstances attending the commission of the offense, and the like, that no fixed or arbitrary rules have been, or properly can be, adopted by the courts.<sup>2</sup> It is clear, of course, that when an attorney's misconduct is such as to demonstrate that he is unfit to practice, his license should be revoked for the protection of the court and the proper administration of justice.<sup>3</sup> On this theory it has been said that when a lawyer has been convicted of want of honesty and integrity, it cannot be claimed that he should be suspended rather than disbarred;<sup>4</sup> and that when he is guilty of misappropriating money, judgment of suspension instead of disbarment should be rendered only if mitigating circumstances are shown.<sup>5</sup> But the practice is by no means uniform on this point.<sup>6</sup> On the other

<sup>2</sup> Under a statute providing that an attorney may be "removed" for misconduct, the removal may be absolute, leaving the attorney to apply for readmission if his offense was of such a kind that, after a lapse of time, he can satisfy the court that he has become trustworthy; or for a stated time, if the court is of opinion that the interests of the public will be sufficiently protected. *Boston Bar Ass'n v. Greenhood*, 168 Mass. 169, 46 N. E. 568. See also *Boston Bar Ass'n v. Scott*, 209 Mass. 200, 95 N. E. 402.

<sup>3</sup> *Fairfield County Bar v. Taylor*, 60 Conn. 11, 22 Atl. 441, 13 L.R.A. 767; *State v. Rohrig*, (Ia.) 139 N. W. 908; *In re Percy*, 36 N. Y. 651.

<sup>4</sup> *In re Platz*, (Utah) 132 Pac. 390.

<sup>5</sup> *In re Buchanan*, 28 Mo. App. 230. See also *Matter of Cohn*, 120 App.

Div. 378, 105 N. Y. S. 84; *New York Bar Assoc. v. Chappell*, 131 App. Div. 69, 115 N. Y. S. 868; *Matter of Gifuni*, 137 App. Div. 351, 121 N. Y. S. 1131; *Matter of Flower*, 138 App. Div. 102, 122 N. Y. S. 886. See generally § 804 et seq.

*Illness and Poverty No Excuse for Fraudulent Misappropriation of Money*.—*Matter of Rosenthal*, 137 App. Div. 772, 122 N. Y. S. 471; *Matter of Levy*, 138 App. Div. 896, 122 N. Y. S. 1134.

*That the amount misappropriated is small*, is not a mitigating circumstance. The standard that the court requires of its officers is not to be measured in dollars and cents. *Matter of Stern*, 120 App. Div. 375, 105 N. Y. S. 199.

<sup>6</sup> See *In re Moore*, 72 Cal. 359, 13

hand, in the absence of a controlling statute, it has been held that to justify the disbarment of an attorney one of three things should be established: (1) Conviction of crime; (2) evidence which, in the judgment of the court, shows that a crime has been committed, and that the facts proven would justify a conviction thereof; (3) such intentional fraud upon the court or a client as shows evidence of moral turpitude; and that for less offenses the court should impose such temporary suspension as it may deem proper.<sup>7</sup> But this enumeration of grounds is plainly incomplete, as it omits contempt of court<sup>8</sup> and non-criminal misconduct towards others than the court or a client.<sup>9</sup> Perhaps the only definite rule on this branch of the subject is that whether the offending attorney shall be disbarred or only suspended from practice is a question resting in the sound discretion of the court invested with the power to render the judgment.<sup>10</sup> It is a generally accepted principle, however, that since the primary purpose of a disbarment proceeding is not punishment, but the protection of the courts and the public, disbarment should never be decreed if any discipline less severe would accomplish the desired result, as when there are prospects that the attorney's conduct and character may undergo reformation.<sup>11</sup> The

Pac. 885, where the attorney was suspended for five years; *In re Greenberg*, 146 App. Div. 945, 131 N. Y. S. 531, suspension for six months; *In re Z——*, 89 Mo. App. 426, suspension for six months. See also *In re Sayer*, 146 App. Div. 928, 131 N. Y. S. 381.

<sup>7</sup> *In re Cahill*, 66 N. J. L. 527, 50 Atl. 119.

<sup>8</sup> See *supra*, § 792.

<sup>9</sup> See *supra*, §§ 794, 832, etc.

<sup>10</sup> *Bar Assoc. of Boston v. Greenhood*, 168 Mass. 169, 46 N. E. 568; *Matter of V——*, 10 App. Div. 491, 42 N. Y. S. 268; *In re Goodman*, 199 N. Y. 143, 92 N. E. 211; *In re Hopkins*, 54 Wash. 569, 103 Pac. 895.

Whether this discretion will be reviewed by an appellate court, see *infra*, "Review of Disbarment Proceedings," § 896 et seq.

<sup>11</sup> *United States*.—*Bradley v. Fisher*, 13 Wall. 354, 20 U. S. (L. ed.) 652.

*New Hampshire*.—*In re Hobbs*, 75 N. H. 285, 73 Atl. 303.

*New York*.—*Matter of V——*, 10 App. Div. 491, 42 N. Y. S. 268; *Matter of Reifschneider*, 60 App. Div. 478, 69 N. Y. S. 1069.

*Oregon*.—See *Ex p. Tanner*, 49 Ore. 31, 88 Pac. 301.

*South Carolina*.—*In re Evans*, 94 S. C. 414, 78 S. E. 227.

"The fact that the respondent has frankly admitted his offense, and has not attempted to uphold it by false statements or perjured testimony, justifies the expectation that he will take a lesson from this occurrence, and will hereafter conduct himself honestly in his relations with his

previous good character and reputation of the attorney will generally be considered as entitling him to some leniency at the hands of the court,<sup>12</sup> though it will not prevent his disbarment if his misconduct is gross and inexcusable.<sup>13</sup> On the other hand, a former disbarment<sup>14</sup> or suspension<sup>15</sup> will naturally be regarded as a circumstance adverse to the attorney. Mitigating or extenuating circumstances often induce the court to render a judgment of suspension rather than disbarment,<sup>16</sup> as where the attorney was young

clients. If he had adopted a different course, and attempted to deny the charges, and to sustain that denial by false testimony, the court would have been compelled to disbar him." In re Greenberg, 146 App. Div. 945, 131 N. Y. S. 531.

Where an attorney had been guilty of serious misconduct, but the matter arose years ago, and had been adjusted by the parties whose private interests were affected, he was suspended for one year. In re Aldrich, (Vt.) 86 Atl. 801.

<sup>12</sup> *California*.—In re Stephens, 84 Cal. 77, 24 Pac. 46.

*Colorado*.—People v. Green, 9 Colo. 506, 13 Pac. 514.

*New York*.—Matter of Lash, 150 App. Div. 467, 135 N. Y. S. 370; Matter of Schleimer, 150 App. Div. 507, 135 N. Y. S. 406; Matter of Sanborn, 152 App. Div. 935, 137 N. Y. S. 1141. Compare In re Burr, 1 Wheel. Crim. 503.

*Ohio*.—In re Cunningham, 9 Ohio Dec. (Reprint) 717, 16 Cine. L. Bul. 447.

*Pennsylvania*.—In re Smith, 179 Pa. St. 14, 36 Atl. 134.

*South Dakota*.—In re Sherin, 27 S. D. 232, Ann. Cas. 1913D 446, 130 N. W. 761, 40 L.R.A.(N.S.) 801.

<sup>13</sup> Matter of Clark, 184 N. Y. 222, 77 N. E. 1.

<sup>14</sup> People v. Green, 9 Colo. 506, 13 Pac. 514.

<sup>15</sup> In re Randall, 122 App. Div. 1, 106 N. Y. S. 943, *affirmed* 196 N. Y. 569, 90 N. E. 1165; Matter of Levy, 138 App. Div. 896, 122 N. Y. S. 1134. See also Matter of Goldberg, 49 App. Div. 357, 63 N. Y. S. 392.

<sup>16</sup> Matter of Gluck, 139 App. Div. 894, 123 N. Y. S. 857; State v. Tanner, 49 Ore. 31, 88 Pac. 301.

*Doubt Occasioned by the Testimony on Part of the Charges*.—See Matter of Goodman, 135 App. Div. 594, 120 N. Y. S. 801, *affirmed* 199 N. Y. 143, 92 N. E. 211; Matter of Boxman, 148 App. Div. 286, 132 N. Y. S. 217.

*Plot against Attorney*.—The attorney of one convicted of murder hired a detective to procure a woman to sign an affidavit as to a pretended conversation with deceased, in which the latter stated it was his intention to commit suicide. The detective informed the prosecuting attorney, who secured a woman to sign the affidavit, which was prepared by the attorney, and signed without being read to the deponent, who was paid therefor. The affidavit was used on a motion for a new trial, when the attorney stated that it had been written at deponent's dictation. It was held that while the attorney was guilty of professional misconduct meriting discipline, the

and inexperienced when he committed the offense,<sup>17</sup> or was actuated by excessive zeal for his client's cause rather than by improper motives;<sup>18</sup> though neither youth and lack of experience,<sup>19</sup> nor excessive zeal,<sup>20</sup> will justify criminal or dishonorable conduct. So, too, the fact that the attorney is the first one who has been brought before the court on the particular charge involved,<sup>21</sup> while others have indulged in similar practices,<sup>1</sup> or that he committed the offense before that particular species of misconduct had been judicially declared to be unprofessional,<sup>2</sup> has been deemed a reason for suspending rather than disbarring him; as where an attorney advertised for divorce cases, apparently without knowledge that it was wrong to do so, and discontinued the practice on or before the commencement of the disbarment proceeding.<sup>3</sup> But when an attorney is guilty of misconduct clearly warranting his disbarment, the fact that there are other attorneys at the same bar equally rep-

plot against him would mitigate his punishment, which was fixed as suspension for one year. *In re Shoemaker*, 38 W. N. C. 54, 5 Pa. Dist. Ct. 161, *affirmed* 2 Pa. Super. Ct. 27.

<sup>17</sup> *In re Goldberg*, 79 Hun 616, 29 N. Y. S. 972; *Matter of Goodman*, 135 App. Div. 594, 120 N. Y. S. 801, *affirmed* 199 N. Y. 143, 92 N. E. 211; *Matter of Chadsey*, 141 App. Div. 458, 126 N. Y. S. 456, *affirmed* 201 N. Y. 572, 95 N. E. 1124; *Matter of Lash*, 150 App. Div. 467, 135 N. Y. S. 370.

<sup>18</sup> *People v. Green*, 9 Colo. 506, 13 Pac. 514; *In re Robinson*, 140 App. Div. 329, 125 N. Y. S. 193; *Matter of Chadsey*, 141 App. Div. 458, 126 N. Y. S. 456, *affirmed* 201 N. Y. 572, 95 N. E. 1124.

<sup>19</sup> *Matter of Rosenthal*, 137 App. Div. 772, 122 N. Y. S. 471.

<sup>20</sup> *Matter of Robinson*, 140 App. Div. 329, 125 N. Y. S. 193, where the temptation of the attorney was great by reason of impending danger to a wealthy and powerful client. *Matter of Chadsey*, 141 App. Div. 458, 126

N. Y. S. 456, *affirmed* 201 N. Y. 572, 95 N. E. 1124.

<sup>21</sup> *Matter of Shay*, 133 App. Div. 547, 118 N. Y. S. 146, *affirmed* 196 N. Y. 530, 89 N. E. 1112; *Matter of Rothschild*, 140 App. Div. 583, 125 N. Y. S. 629.

<sup>1</sup> *In re Shay*, 133 App. Div. 547, 118 N. Y. S. 146, *affirmed* 196 N. Y. 530, 89 N. E. 1112, contracting to divide with a layman the compensation to be received by the attorney from negligence cases procured by the layman, such agreements being prohibited by statute but being commonly made by lawyers engaged in prosecuting such actions. It was said in that case, however, that these circumstances would not be considered in future cases of that kind.

<sup>2</sup> *In re Imperatori*, 152 App. Div. 86, 136 N. Y. S. 675.

<sup>3</sup> *People v. MacCabe*, 18 Colo. 186, 32 Pac. 280, 36 Am. St. Rep. 270, 19 L.R.A. 231; *In re Schnitzer*, 33 Nev. 581, 112 Pac. 848.

reprehensible is not a mitigating circumstance.<sup>4</sup> Sometimes the court suspends the attorney for a stated period and until further order of the court, thus reserving to itself the power to require the attorney to show as a condition to reinstatement that he has abstained from practice and conducted himself properly during the time of his suspension.<sup>5</sup> In one case an attorney was indefinitely suspended, with the privilege, however, to move before the court for reinstatement after the expiration of two years, upon satisfactory proof that he had not, for two years immediately preceding his application, used intoxicating liquors, and that he had reformed his character.<sup>6</sup> In some states an attorney may be suspended for a certain time and until he repays money that he has misappropriated,<sup>7</sup> or pays the costs of the proceedings against him.<sup>8</sup> But the better opinion is that disbarment proceedings may not be used as a means of compelling an attorney to repay money,<sup>9</sup> and that in the absence of statutory authority costs cannot be awarded against him in such proceedings.<sup>10</sup> Although the statutes generally prescribe disbarment or suspension, in the alternative, as

<sup>4</sup> In re Platz, (Utah) 132 Pac. 390. Compare Matter of Shay, 133 App. Div. 547, 118 N. Y. S. 146, *affirmed* 196 N. Y. 530, 89 N. E. 1112.

<sup>5</sup> In re Rothschild, 140 App. Div. 583, 125 N. Y. S. 629. See also Matter of Chadsey, 141 App. Div. 458, 126 N. Y. S. 456, *affirmed* 201 N. Y. 572, 95 N. E. 1124; Matter of Cohn, 141 App. Div. 511, 126 N. Y. S. 218; In re Sayer, 146 App. Div. 928, 131 N. Y. S. 381; Matter of Boxman, 148 App. Div. 286, 132 N. Y. S. 217; Matter of Lash, 150 App. Div. 467, 135 N. Y. S. 370.

In a collateral proceeding, a judgment disbarring an attorney for three years, and "until the further order of the court," cannot be held invalidated by the quoted clause, even if it is void, for it may be considered as mere surplusage. *Philbrook v. Newman*, 85 Fed. 139, where the court, how-

ever, expressed no opinion as to the validity of the clause.

<sup>6</sup> In re Evans, 94 S. C. 414, 78 S. E. 227.

<sup>7</sup> In re Tyler, 78 Cal. 307, 20 Pac. 674, 12 Am. St. Rep. 55, a case which apparently confuses a disbarment proceeding with a summary proceeding to compel an attorney to repay money received by him in his professional capacity.

<sup>8</sup> *People v. Brown*, 17 Colo. 431, 30 Pac. 338; *People v. MacCabe*, 18 Colo. 186, 32 Pac. 280, 36 Am. St. Rep. 270, 19 L.R.A. 231.

<sup>9</sup> Matter of Rockmore, 130 App. Div. 586, 117 N. Y. S. 512; Matter of Fox, 150 App. Div. 602, 135 N. Y. S. 821, refusing to dismiss charges on condition that the attorney repay to his client money misappropriated.

<sup>10</sup> See *infra*, § 895.

a penalty for professional misconduct,<sup>11</sup> in the absence of express restriction these statutes do not limit the inherent common-law power of the courts,<sup>12</sup> which may be exercised to inflict a less severe punishment for conduct which, under the circumstances disclosed, is not grave enough to warrant the penalty of suspension or disbarment.<sup>13</sup> In such cases, therefore, the attorney may be reprimanded from the bench in open court,<sup>14</sup> or may be censured in the court's written opinion, which will be published in the official reports,<sup>15</sup> or the proceedings may be dismissed with a mere expression of the court's disapproval of the attorney's conduct.<sup>16</sup> When,

<sup>11</sup> See the various statutes on this subject.

<sup>12</sup> See *supra*, §§ 758, 759.

<sup>13</sup> *Matter of Reifschneider*, 60 App. Div. 478, 69 N. Y. S. 1069; *In re Gadsden*, 89 S. C. 352, 71 S. E. 952.

*Contra*.—It has been held that a court clothed by statute with power to strike the name of an attorney from the rolls for specified offenses has no power to impose a less severe penalty. *In re Burton*, [1903] 2 K. B. (Eng.) 300, 72 L. J. K. B. 752; *In re Kelley*, [1895] 1 Q. B. (Eng.) 180; *In re Forbes*, 2 N. W. Terr. 410. *Compare* *In re Lamb*, 23 Q. B. D. (Eng.) 477.

<sup>14</sup> *Matter of Reifschneider*, 60 App. Div. 478, 69 N. Y. S. 1069, where the attorney was a young man against whom no charges had previously been brought.

<sup>15</sup> *Matter of Manheim*, 113 App. Div. 136, 99 N. Y. S. 87. This is frequently deemed sufficient. See *Matter of Woytisek*, 120 App. Div. 373, 105 N. Y. S. 144; *Matter of Doyle*, 138 App. Div. 99, 122 N. Y. S. 1000; *Matter of Boehm*, 150 App. Div. 443, 135 N. Y. S. 42; *Matter of Cohn*, 150 App. Div. 470, 134 N. Y. S. 1103; *Matter of Schleimer*, 150 App. Div. 507, 135 N. Y. S. 406; *Matter of Fox*,

150 App. Div. 602, 135 N. Y. S. 821; *Matter of Barnard*, 151 App. Div. 580, 136 N. Y. S. 185; *Matter of Sanborn*, 152 App. Div. 935, 137 N. Y. S. 1141; *Matter of Kisselburgh*, 153 App. Div. 884, 137 N. Y. S. 1060.

In New York, by chapter 253 of the Laws of 1912, the Appellate Division of the Supreme Court is expressly authorized to censure as well as to suspend or remove attorneys guilty of misconduct—a provision which is apparently superfluous in view of previous decisions of that court.

<sup>16</sup> *Matter of Hutson*, 127 App. Div. 492, 111 N. Y. S. 731, where the attorney, some time before the proceedings were begun, had discontinued the objectionable practice complained of. *In re Gadsden*, 89 S. C. 352, 71 S. E. 952, where the attorney had been guilty of no fraud, and his misconduct was induced by zeal for his client. See also *State v. Fourchy*, 106 La. 743, 31 So. 325.

*Opinion of Committee of the Bar*.—In some states this is done in deference to the opinion of a committee of the bar who have appeared in the proceedings. *In re Snow*, 27 Utah 265, 75 Pac. 741; *In re Aldrich*, (Vt.) 86 Atl. 801.



however, the court fails to find the attorney guilty, and dismisses the charges for further proceedings, it has no power to render judgment that he be reprimanded.<sup>17</sup>

§ 895. **Costs and Expenses of Proceeding.**—Since costs are solely the creature of statute, the general rule is that in a disbarment proceeding no costs can be awarded to either party against the other in the absence of statutory authority therefor.<sup>18</sup> Thus if the accused attorney is successful he is not entitled to costs against the persons who instituted the proceedings,<sup>19</sup> and if he is disbarred or otherwise disciplined, no costs can be awarded against him.<sup>20</sup> In a disbarment proceeding instituted by the state on the complaint of an individual or a bar association, the costs of a successful appeal by the attorney should not be taxed against the complainant or relator,<sup>21</sup> but should be borne by the state.<sup>1</sup> There are cases, however, in which the courts, without referring to any statutory authority and without noticing the rule stated, have imposed

<sup>17</sup> *State v. Tracy*, 115 Ia. 71, 87 N. W. 727.

<sup>18</sup> *In re Watt*, 154 Fed. 678; *Morton v. Watson*, 60 Neb. 672, 84 N. W. 91; *In re Eaton*, 7 N. D. 269, 74 N. W. 870; *State v. Martin*, 45 Wash. 76, 87 Pac. 1054.

In South Dakota the allowance of costs and disbursements is regulated by statute. See *In re Egan*, 22 S. D. 563, 119 N. W. 42; *In re Sherin*, 28 S. D. 420, 133 N. W. 701, *modifying* 27 S. D. 232, Ann. Cas. 1913D 446, 130 N. W. 761; *In re Kirby*, 10 S. D. 416, 73 N. W. 908.

**Security for Costs.**—An Alabama statute (Gen. Acts 1903, p. 346) makes it the duty of the solicitor to prosecute disbarment proceedings, and provides that the court, on the solicitor's motion and on good cause shown, may at any time require the Alabama state bar association to give security for the costs of such proceeding, to be approved by the court.

But security for costs in such a proceeding can be required only on motion of the solicitor. *Johnson v. State*, 152 Ala. 93, 44 So. 671.

<sup>19</sup> Cases in preceding note.

<sup>20</sup> *State v. Fisher*, 82 Neb. 361, 117 N. W. 882, *judgment affirmed on rehearing* 82 Neb. 367, 119 N. W. 249.

The court may require each party to pay his own costs. *State v. Fisher*, 82 Neb. 361, 117 N. W. 882, *judgment affirmed on rehearing*, 82 Neb. 367, 119 N. W. 249.

No costs can be imposed upon the accused attorney when he is not found guilty. *State v. Tracy*, 115 Ia. 71, 87 N. W. 727.

<sup>21</sup> *Turner v. Com.*, 2 Mete. (Ky.) 619; *State v. Martin*, 45 Wash. 76, 87 Pac. 1054.

The complainant or relator is not really a party. See cases cited *supra*, this note.

<sup>1</sup> *State v. Martin*, 45 Wash. 76, 87 Pac. 1054.

costs upon the attorney disbarred or suspended,<sup>2</sup> or upon the petitioners or complainants when the charges were not sustained.<sup>3</sup> In New York, when an application is made to the supreme court by one attorney to disbar another, the court, by virtue of its authority over the conduct of its attorneys, has power, independent of statute, upon determining that the proceedings were instituted in bad faith, to order the disbursements and costs of the motion to be paid by the applicant; and its decision is not reviewable by the court of appeals.<sup>4</sup> In some states by statute the expenses and costs of the proceeding are payable by the county,<sup>5</sup> and it is the settled practice under some of such statutes for the compensation of attorneys who prosecute the charges to be included in the expenses thus paid.<sup>6</sup>

<sup>2</sup> In *re* Washington, 82 Kan. 829, 109 Pac. 700; *Ex p.* Ditchburn, 32 Ore. 538, 52 Pac. 694.

<sup>3</sup> *State v. Kemp*, 82 Mo. 213, where the charges were prosecuted by private individuals and were entitled in the name of the state, but without authority. The court said that if the charges had been prosecuted in the name of the state at the instance of the prosecuting attorney or pursuant to an order of court, costs might properly have been adjudged against the state; but that a person could not of his own motion "set on foot such proceedings in the name of the state and burden it with the costs of failure."

<sup>4</sup> In *re* Kelly, 59 N. Y. 595. See also *Matter of Haskell*, 150 App. Div. 837, 135 N. Y. S. 249; *Bormay v. Van Ness*, 26 Misc. 599, 56 N. Y. S. 640.

<sup>5</sup> Mass. R. L. c. 165, § 44; *Burrage v. Bristol County*, 210 Mass. 299, 96 N. E. 719; N. Y. Judiciary Law, § 88, subd. 5 (formerly Code Civ. Pro. 68);

*Matter of V*——, 10 App. Div. 491, 513, 42 N. Y. S. 268.

In New York the power of the court to order payment to be made by the county is discretionary, not mandatory; and if no such order is made, a stenographer who, by consent of counsel on both sides, took the minutes of the testimony at the trial and furnished copies to the referee and to the parties, can recover his fees from the petitioner and the respondent. *Bormay v. Van Ness*, 26 Misc. 599, 56 N. Y. S. 640.

<sup>6</sup> *Burrage v. Bristol County*, 210 Mass. 299, 96 N. E. 719.

In New York it is the practice in the second department for the presiding justice of the appellate division to award counsel fees to the attorney who prosecutes the charges, and to direct that payment be made by the county; but this practice is not followed in the first department, where disbarment proceedings are much more numerous.

## CHAPTER XXXII.

### REVIEW OF DISBARMENT PROCEEDINGS.

§ 896. In General.

897. Appeal.

898. Writ of Error.

899. Certiorari.

900. Mandamus.

901. By Accuser, Petition or State.

§ 896. In General. — A judgment or order disbarring or suspending an attorney from practice can usually be reviewed by an appellate court in some form of proceeding, whether it be an appeal, writ of error, writ of review, certiorari, or mandamus.<sup>1</sup> The right to a review in such cases, as well as the scope thereof, usually depends, however, upon the provisions of the local statutes, which should always be consulted; and in the absence of express statutory authority therefor, the right has been held not to exist.<sup>2</sup>

§ 897. Appeal. — Under the statutory systems of many jurisdictions an attorney who has been disbarred or suspended from practice may obtain a review of the proceedings and judgment or order by means of an appeal;<sup>3</sup> and in a few states the right of ap-

<sup>1</sup> See the following sections.

A *writ of review* will lie to review an order suspending an attorney from practice, where it appears that the order was made without notice to the attorney, and where he had no opportunity to make a defense. *McNamee v. Steele*, 8 Idaho 339, 69 Pac. 319.

A *writ of prohibition* may issue to prevent an order being entered in a lower court disbarring an attorney, where it appears that such court has

no power to render a judgment of disbarment. *State v. Laughlin*, 73 Mo. 443.

<sup>2</sup> *Com. v. Judges*, 5 Watts & S. (Pa.) 272. See also *State v. Johnston*, 2 Har. & McH. (Md.) 160. But see *In re Trumbore*, 2 Penny. (Pa.) 84, 14 Lanc. Bar. 127. See the following section.

<sup>3</sup> *District of Columbia*.—In *re Adriaans*, 28 App. Cas. 515.

*Illinois*.—*Winkelman v. People*, 50 Ill. 449.

peal in cases of this character is conferred and regulated by express provisions of the statutes.<sup>4</sup> In some cases, however, appeals by attorneys have been entertained without any statutory authority

*Indiana*.—Heffren *v.* Jayne, 39 Ind. 463, 13 Am. Rep. 281; Walls *v.* Palmer, 64 Ind. 493; *Ex parte* Trippe, 66 Ind. 531.

*Kentucky*.—Turner *v.* Com., 2 Mete. 619. See also Wilson *v.* Pop- ham, 91 Ky. 327, 15 S. W. 859.

But an appeal does not lie directly to the court of appeals from an order of the Louisville city court, disbar- ring or suspending an attorney from practicing in that court. Smith *v.* Com., 1 S. W. 433, 8 Ky. L. Rep. 260.

*Massachusetts*.—Bar Assoc. of Bos- ton *v.* Greenhood, 168 Mass. 169, 46 N. E. 568.

*Michigan*.—Matter of Wool, 36 Mich. 299.

But an order of the circuit court overruling a demurrer to charges filed in that court against an attor- ney is not reviewable by the supreme court, except after final judgment. *In re* Radford, 159 Mich. 91, 123 N. W. 546, 16 Detroit Leg. N. 757.

*Missouri*.—Shackelford *v.* McEl- hinney, 241 Mo. 592, 145 S. W. 1139. See also *In re* Beal, 5 Mo. App. 583; *In re* Bowman, 7 Mo. App. 569.

*Oklahoma*.—*In re* Brown, 2 Okla. 590, 39 Pac. 469, sustaining an ap- peal from an order suspending an attor- ney from practice pending trial on an information for his disbarment.

*Tennessee*.—Brooks *v.* Fleming, 6 Baxt. 331, holding that an attorney may appeal from an order disbarring him for contempt of court in dis- obeying an injunction.

*Texas*.—Casey *v.* State, 25 Tex. 380, holding that an attorney may

appeal from a judgment disbarring him for contempt of court involving fraudulent or dishonorable conduct or malpractice.

*Wisconsin*.—*In re* Orton, 54 Wis. 379, 11 N. W. 584.

Appeal by accuser, petitioner or state, see *infra*, § 901.

*Reprimand and Costs*.—It has been held that a judgment reprimanding the attorney and imposing costs upon him is appealable. State *v.* Tracy, 115 Ia. 71, 87 N. W. 727. On the other hand, it has been held in such a case that the attorney may appeal from the judgment for costs, but that the reprimand cannot be reviewed. Finley *v.* Acme Kitchen Furniture Co., 119 Tenn. 698, 109 S. W. 504.

*If the period of suspension has ex- pired* when the case is reached in the appellate court, the court will refuse further to examine the record. *In re* Beal, 5 Mo. App. 583.

*Death of Attorney*.—An order in an action for divorce, referring to a referee certain charges against one of the attorneys, will not be reviewed on appeal after the death of the attor- ney. Beadleston *v.* Beadleston, 50 Hun 603 mem., 2 N. Y. S. 815.

<sup>4</sup>State *v.* Mosher, 128 Ia. 82, 5 Ann. Cas. 984, 103 N. W. 105; *In re* Norris, 60 Kan. 649, 57 Pac. 528; *In re* Burnette, 73 Kan. 609, 85 Pac. 575; *In re* Crum, 7 N. D. 316, 75 N. W. 257; *In re* Houghton, 5 S. D. 737, 59 N. W. 733, holding, however, that the general statute relating to appeals limited the time within which to ap- peal from a judgment of disbarment.

therefor.<sup>5</sup> In New York the court of appeals has often reviewed disbarment cases on appeal by the attorneys, without questioning its jurisdiction under the constitution or statutes;<sup>6</sup> but it has been recently said that such cases were "unique," and that it was "by no means clear" that applications for disbarment were special proceedings within the meaning of the statutes relating to appeals, yet that the practice of entertaining such appeals had become "too well settled to be disturbed."<sup>7</sup> In other jurisdictions the attorney's right to appeal in the absence of statutory authority has been denied.<sup>8</sup> The scope of appellate review in some states is limited to questions of law, neither the weight of the evidence nor the discretion of the lower court in inflicting punishment being reviewable.<sup>9</sup>

<sup>5</sup> *Fairfield County Bar v. Taylor*, 60 Conn. 11, 22 Atl. 441, 13 L.R.A. 767 (where objections to the appeal were expressly waived); *Matter of Westcott*, 66 Conn. 585, 34 Atl. 505; *In re Durant*, 80 Conn. 140, 10 Ann. Cas. 539, 67 Atl. 497.

<sup>6</sup> *In re Percy*, 36 N. Y. 651; *Matter of Gale*, 75 N. Y. 526; *In re Eldridge*, 82 N. Y. 161, 37 Am. Rep. 558, 2 Ky. L. Rep. 75, where the only question was whether the court could review the exercise of discretion by the court below; *Matter of —*, 86 N. Y. 563.

<sup>7</sup> *Matter of Droege*, 197 N. Y. 44, 50, 51, 90 N. E. 340, a proceeding to remove a city magistrate, in which it was held, however, that the court of appeals could not review the action of the appellate division.

<sup>8</sup> *State v. Johnston*, 2 Har. & McH. (Md.) 160; *Ex p. Biggs*, 64 N. C. 202, disbarment for contempt; *Com. v. Judges*, 5 Watts & S. (Pa.) 272. But see *In re Trumbore*, 2 Penny. (Pa.) 84, 14 Lane. Bar 127.

<sup>9</sup> *Bar Assoc. of Boston v. Greenhood*, 168 Mass. 169, 46 N. E. 568. See also *Boston Bar Ass'n v. Casey*,

196 Mass. 100, 81 N. E. 892; *In re Hopkins*, 54 Wash. 569, 103 Pac. 805.

*In New York*, on appeal to the court of appeals, the court's power to review ends when it appears that the proceeding has been instituted and conducted in accordance with the rules; that no substantial right of the accused has been violated; that no prejudicial error has been committed in the reception or exclusion of evidence; and that there is some evidence to sustain the findings on which the judgment is based; the court being without power to review the discretion of the appellate division in inflicting the punishment. *In re Goodman*, 199 N. Y. 143, 92 N. E. 211, affirming 135 App. Div. 594, 120 N. Y. S. 801. Formerly the scope of review was broader. *Matter of Eldridge*, 82 N. Y. 161, 37 Am. Rep. 558, where the court said: "While the measure of punishment consequent upon a conclusion of guilt may fairly be said to be within the discretion of the immediate tribunal, the conclusion itself, the adjudication of guilt or innocence upon the facts, is not so far the subject of discretion as to be beyond review. The class of or-

In many other jurisdictions, however, questions of fact and the exercise of discretion by the lower court are subject to review; but the determination of the lower court will not be disturbed unless it is clearly against the weight of the evidence or unless an abuse of discretion appears.<sup>10</sup> The attorney's relation to the court and the character and purpose of the inquiry are such that unless it

ders not reviewable for that reason are substantially those addressed to the favor of the court, to which the applicant has no absolute right, which may or may not be granted without wrong on either hand. The order in question is not of that character. The guilt or innocence of this appellant does not rest in the absolute discretion of any court. An acquittal is his right if upon the facts he is not shown to be guilty, and we cannot evade or avoid the inquiry. . . . A plain line of distinction is drawn between proceedings for a contempt occurring in the presence of the judge, and the facts constituting which are certified by him, and cases of professional misconduct out of the immediate presence of the court, where the actual truth is matter of evidence. In the former class of cases it is held that the facts embodied in the order of the judge must be taken as true. In the latter, the right of review is asserted not only where there had been want of jurisdiction, but also where the court below had decided erroneously on the testimony." See also *Matter of —*, 86 N. Y. 563, 575, holding, however, that there must be "an irregularity or plain impropriety in the conduct of the court below" to warrant a reversal.

*The discretion of the court in imposing costs upon an attorney who instituted disbarment proceedings in*

bad faith, is not reviewable on appeal. In *re Kelly*, 59 N. Y. 595.

<sup>10</sup> *California*.—In *re Wharton*, 114 Cal. 367, 46 Pac. 172, 55 Am. St. Rep. 72.

*Connecticut*.—*Fairfield County Bar v. Taylor*, 60 Conn. 11, 22 Atl. 441, 13 L.R.A. 767; In *re Westcott*, 66 Conn. 585, 34 Atl. 505; *Selleck v. Head*, 77 Conn. 15, 58 Atl. 224; In *re Durant*, 80 Conn. 140, 10 Ann. Cas. 539, 67 Atl. 497.

*District of Columbia*.—In *re Adriaans*, 28 App. Cas. 515.

*Florida*.—*Zachary v. State*, 53 Fla. 94, 43 So. 925.

*Georgia*.—*Jones v. McCullough*, 138 Ga. 16, 74 S. E. 694.

*Kansas*.—*Matter of Wilson*, 79 Kan. 674, 17 Ann. Cas. 690, 100 Pac. 635, 21 L.R.A. (N.S.) 517.

*Kentucky*.—*Rice v. Com.*, 18 B. Mon. 472.

In *Turner v. Com.*, 2 Mete. 619, it was contended that an appeal did not lie from an order disbarring an attorney from practice because the charges of which he was adjudged guilty amounted merely to contempt of court. The court said: "In reply to the first point it may be said, that conceding for the present the charges against appellant to be within that class of offenses denominated contempt of court, and punishable by summary proceedings had in the court against which they are committed;

clearly appears that his rights have in some substantial way been denied him, the reviewing court will not interfere with the action of the court below.<sup>11</sup> The review which the court will make will not be permitted to take as wide a range, or assume the same character, as where the judicial action sought to be reviewed concerns the rights of parties as between themselves and into the determination of which the element of judicial discretion does not enter. On the contrary, in a proceeding by which a court seeks to inform itself of the personal fitness of one of its own officers to continue in that capacity, there is every reason why an appeal should not be entertained for the purpose of exacting from the court that compliance with technical rules, born of trial by jury, which are too often suffered to hedge about a trained trier of ordinary actions, quite regardless of their purpose or spirit, or their substantial value under the existing conditions.<sup>12</sup> In some states the case is tried *de novo* in the appellate court;<sup>13</sup> but in others the appellate court has no jurisdiction to try the case *de novo*.<sup>14</sup> A judgment

and conceding that the power to inflict punishment for such offenses is necessarily incident, and indeed essential, to the very existence of every court—still it by no means follows that such power is unlimited and beyond control, or that abuse may not be corrected by another tribunal having general revisory power over the court in which such abuse may have occurred.”

*Michigan*.—In *re* Wool, 36 Mich. 299.

*Missouri*.—In *re* Bowman, 7 Mo. App. 569, holding that when the trial was by jury and no material error was committed, the appellate court cannot interfere with the judgment if it is in accordance with the nature of the facts found.

*North Dakota*.—In *re* Crum, 7 N. D. 316, 75 N. W. 257.

Where numerous specific charges are preferred in disbarment proceed-

ings, and the court finds the accused guilty on several of them, and enters judgment thereon, it should not be reversed if any one of the findings is sustained by the evidence. In *re* Wilson, 79 Kan. 674, 17 Ann. Cas. 690, 100 Pac. 635, 21 L.R.A.(N.S.) 517.

<sup>11</sup> In *re* Durant, 80 Conn. 140, 10 Ann. Cas. 539, 67 Atl. 497. See also *State v. Howard*, 112 Ia. 256, 83 N. W. 975.

<sup>12</sup> *Leonard v. Gillette*, 79 Conn. 664, 66 Atl. 502; In *re* Durant, 80 Conn. 140, 10 Ann. Cas. 539, 67 Atl. 497.

<sup>13</sup> *State v. Mosher*, 128 Ia. 82, 5 Ann. Cas. 984, 103 N. W. 105; *Ex p. Steinman*, 95 Pa. St. 236, 40 Am. Rep. 637; *Davis v. State*, 92 Tenn. 646, 23 S. W. 59.

<sup>14</sup> In *re* Burnette, 73 Kan. 609, 85 Pac. 575; *State v. Smith*, 176 Mo. 90, 75 S. W. 586.

suspending an attorney is self-executing and is not affected by an appeal and a supersedeas, except as to the collection of costs.<sup>15</sup> But if the appellate court has duly granted a stay of proceedings pending the appeal, the attorney is entitled meanwhile to all his former privileges in court.<sup>16</sup> When the appellate court remands the case to the lower court for trial, the accusation need not be refiled in the trial court.<sup>17</sup>

**§ 898. Writ of Error.**—In some states disbarment proceedings may be reviewed on a writ of error sued out by the attorney; but the appellate court should not interfere with the conclusions of the latter court upon the evidence, unless it is clear, in the light of the rule which requires clear proof of the act and of the bad motive of the attorney, that the lower court has decided erroneously, in which case it is the duty of the appellate court to interfere.<sup>18</sup> An order of a state court suspending an attorney from practice is not superseded by a writ of error from the Supreme Court of the United States, as a writ of error in the United States courts operates as a supersedeas only when the judgment requires the issuance of process for its enforcement.<sup>19</sup>

**§ 899. Certiorari.**—It has been said that the proper method of securing an appellate review of disbarment proceedings is by certiorari in the nature of a writ of error, which is used where a writ of error proper does not lie.<sup>20</sup> On the other hand, it has been

<sup>15</sup> *Walls v. Palmer*, 64 Ind. 493. But see *Heffren v. Jayne*, 39 Ind. 463, 13 Am. Rep. 281.

<sup>16</sup> *Bird v. Gilbert*, 40 Kan. 469, 19 Pac. 924.

<sup>17</sup> *In re Burnette*, 73 Kan. 609, 85 Pac. 575.

<sup>18</sup> *Beene v. State*, 22 Ark. 149; *Zachary v. State*, 53 Fla. 94, 43 So. 925; *Strother v. State*, 1 Mo. 605; *In re H— T—*, 2 Penny. (Pa.) 99; *State v. Stiles*, 48 W. Va. 429, 37 S. E. 620. See also *Smith v. State*, 1 Verg. (Tenn.) 228; *Scott v. State*, 86 Tex. 321, 24 S. W. 789; *Walker v.*

*State*, 4 W. Va. 749; *State v. McClagherty*, 33 W. Va. 250, 10 S. E. 407.

In *State v. Shumate*, 48 W. Va. 359, 37 S. E. 618, it was held that a writ of error would lie for the reason that disbarment proceedings are proceedings for contempt, and that the constitution and statutes allow writs of error in contempt proceedings. See also *State v. Stiles*, 48 W. Va. 425, 37 S. E. 620.

<sup>19</sup> *Tyler v. Presley*, 72 Cal. 290, 13 Pac. 856.

<sup>20</sup> *Ex p. Biggs*, 64 N. C. 202.



held that a writ of certiorari will issue to a lower court where that court is without jurisdiction or is seeking to exercise unauthorized power in disbarment proceedings; but that the court from which the writ issues will consider only jurisdictional errors apparent on the face of the record, and will not go into the merits of the controversy.<sup>1</sup> And where the lower court has general jurisdiction and proceeds according to the common law, its action in removing an attorney cannot be revised or corrected by an appellate court on a writ of certiorari.<sup>2</sup> A proceeding to disbar an attorney has been held not to be an "action" within the meaning of a statute providing that, whenever in any action at law the issue raised on a demurrer shall be decided adversely to the demurrant, the decision may be reviewed by certiorari.<sup>3</sup>

§ 900. **Mandamus.**—If there is no method provided by statute for reviewing proceedings in disbarment, it seems that the attorney has a right to have the proceedings reviewed on an application for a writ of mandamus to compel the lower court to reinstate him; and on application for the writ the appellate court may review the evidence in the disbarment proceedings and order a reinstatement if it clearly appears that the inferior court committed error.<sup>4</sup> On such an application the appellate court will review the proceedings in the lower court to a certain extent; and if it appears that the lower court had no jurisdiction or proceeded in an unauthorized manner, the writ will lie to compel the attorney's reinstatement.<sup>5</sup> Ordinarily, however, an attorney who has been disbarred is not entitled to have the disbarment proceedings

By this writ only the record proper is brought up. *Ex p. Biggs*, 64 N. C. 202.

<sup>1</sup> *State v. Smith*, 176 Mo. 90, 75 S. W. 586. See also *Fletcher v. Daingerfield*, 20 Cal. 427.

*When Client Not Proper Party to Bring Certiorari.*—See *Baird v. Justice's Court*, 11 Cal. App. 439, 105 Pac. 259.

<sup>2</sup> *In re Randall*, 11 Allen (Mass.) 472.

<sup>3</sup> *In re Radford*, 159 Mich. 91, 123 N. W. 546, 16 Detroit Leg. N. 757.

<sup>4</sup> *State v. Kirke*, 12 Fla. 278, 95 Am. Dec. 314.

<sup>5</sup> *Hurst's Case*, 1 Lev. (Eng.) 75; *Leigh's Case*, 3 Mod. (Eng.) 333; *Ex p. Bradley*, 7 Wall. 364, 19 U. S. (L. ed.) 214; *Ex p. Robinson*, 19 Wall. 595, 22 U. S. (L. ed.) 205; *Withers v. State*, 36 Ala. 252; *People v. Turner*, 1 Cal. 190; *In re Randall*, 11 Allen (Mass.) 473; *People v. Jus-*

reviewed on an application to an appellate court for a writ of mandamus to compel the lower court to reverse its decision and reinstate him. Undoubtedly the judgment of an inferior court may be reversed in a superior court having appellate jurisdiction over it, and a mandate issued commanding it to carry into execution the judgment of the appellate tribunal: but the writ will not issue from the higher tribunal commanding the inferior court to reverse or annul its decision, where the decision is in its nature a judicial act and within the scope of its jurisdiction and discretion.<sup>6</sup>

ties, 1 Johns Cas. (N. Y.) 181; *State v. Sachs*, 2 Wash. 373, 26 Pac. 865. See also *People v. Dowling*, 55 Barb. (N. Y.) 197; *State v. Shumate*, 48 W. Va. 359, 37 S. E. 618.

In *Walls v. Palmer*, 64 Ind. 493, the court said: "When an attorney has been improperly suspended, or disbarred by a judgment which is a nullity, the writ of mandate is a proper remedy to restore him to his rights; but when he has been properly suspended or disbarred, the writ will not lie. The authorities, we believe, uniformly support the above proposition."

It has been held that where the judgment of the inferior court is clearly wrong by reason of errors in the proceedings, mandamus will issue to compel the inferior court to reinstate the attorney, and on an application for the writ of the superior court will review the proceedings of the lower court to this extent. *People v. Turner*, 1 Cal. 144, 52 Am. Dec. 295; *People v. Turner*, 1 Cal. 152.

Where a judge improperly excludes an attorney from practice, and refuses to enter the order on record or allow an appeal, the remedy is in mandamus. *Ingersoll v. Howard*, 1 Heisk. (Tenn.) 247. But the refusal to listen to an attorney in a single

case cannot be regarded as disbarring him from practice in that court, and will not justify the issuance of a mandamus to allow him to practice there. *People v. Dowling*, 37 How. Pr. (N. Y.) 394.

<sup>6</sup> Ex p. Burr, 9 Wheat. 529, 6 U. S. (L. ed.) 152; Ex p. Secombe, 19 How. 9, 15 U. S. (L. ed.) 565; Ex p. Wall, 107 U. S. 265, 8 S. Ct. 569, 27 U. S. (L. ed.) 552; *State v. Maxwell*, 19 Fla. 38; *Walls v. Palmer*, 64 Ind. 493; Ex p. Biggs, 64 N. C. 202.

In *In re Randall*, 11 Allen (Mass.) 473, the court said: "In the first place, it is too clear to admit of debate that, in a proceeding of this nature, the doings of inferior courts cannot be revised or corrected in matters which are within their jurisdiction, and in regard to which they are authorized to exercise a judicial discretion, and to render a judgment according to the conclusions of fact and law at which they may arrive. If a party is aggrieved by the action of a judicial tribunal in relation to such matters, he must seek redress in other modes than by writ of mandamus." For an application of the rule to a determination of the Secretary of the Interior, see *Garfield v. U. S.*, 32 App. Cas. (D. C.) 109. The attorney's petition for mandamus must state that

§ 901. **By Accuser, Petition or State.** — As the right of appeal is usually given by statute only to a party who is aggrieved or prejudiced, or whose substantial rights are affected by the determination of the court, it is generally held that the accuser or the petitioner cannot appeal from an order or judgment dismissing disbarment proceedings.<sup>7</sup> It has also been held that such a proceeding prosecuted by the state is a *quasi*-criminal case in which no appeal can be taken by the state from a judgment for defendant.<sup>8</sup> On the other hand, it has been held that a county bar association, instituting a special proceeding to recall a license to practice law, is aggrieved by an order dismissing the petition, and may appeal therefrom.<sup>9</sup>

the court improperly removed him.  
In re Gephard, 1 Johns. Cas. (N. Y.)  
134.

<sup>7</sup>In re Thompson, (Cal.) 45 Pac.  
1034; Byington v. Moore, 70 Ia. 206,  
30 N. W. 485; Brooks v. Fleming, 3

Baxt. (Tenn.) 331; In re Ault, 15  
Wash. 417, 46 Pac. 644.

<sup>8</sup>State v. Tunstall, 51 Tex. 81.

<sup>9</sup>Vernon County Bar Ass'n v. Mc-  
Kibbin, 153 Wis. 350, 141 N. W.  
283.

## CHAPTER XXXIII.

### REINSTATEMENT.

§ 902. In General.

903. Procedure.

§ 902. In General. — It is generally held that a court which has power to disbar an attorney has power to reinstate him on good cause being shown, and in a number of instances courts have exercised this power.<sup>1</sup> Statutes relating to disbarment, however,

<sup>1</sup>*England*.—*Rex v. Greenwood*, 1 W. Bl. 222; Anonymous, 17 Beav. 475; *Re Robins*, 11 Jur. N. S. 504.

*United States*.—In *re Boone*, 90 Fed. 793.

*California*.—In *re Treadwell*, 114 Cal. 24, 45 Pac. 993; In *re Burris*, 147 Cal. 370, 81 Pac. 1077.

*Colorado*.—In *re Browne*, 2 Colo. 553; *People v. Essington*, 32 Colo. 168, 75 Pac. 394.

*Montana*.—In *re Newton*, 27 Mont. 182, 70 Pac. 519, 982.

*New Hampshire*.—In *re Hobbs*, 75 N. H. 285, 73 Atl. 303.

*North Dakota*.—In *re Simpson*, 11 N. D. 526, 93 N. W. 918.

*South Dakota*.—In *re Ramsey*, 26 S. D. 352, 128 N. W. 176.

*Utah*.—In *re Evans*, 130 Pac. 217.

See also *supra*, § 900.

*Aquittal of crime* for which attorney was disbarred, see In *re H - T -*, 2 Penny. (Pa.) 84, 14 Lanc. Bar. 127.

*Attorney Disbarred on Perjured Testimony*.—After plaintiff in a personal injury action had recovered

judgment against a street railway company, a new trial was granted on certain of plaintiff's witnesses retracting their testimony and testifying that they had been induced by plaintiff's attorney to testify falsely, whereupon the attorney was disbarred on charges preferred by the company. Several years thereafter it was discovered that such retracting witnesses and others, pending the motion for new trial, were being paid large sums of money by the railway company, and that the company also paid to the referee who reported the facts on the motion for a new trial, a sum far in excess of the value of his services. The attorney's petition for reinstatement was referred to an official referee, and the Bar Association was requested to take such action as the evidence warranted. *Nugent v. Metropolitan St. R. Co.*, 146 App. Div. 775, 131 N. Y. S. 423. After a hearing, the official referee found that the attorney was not guilty of the charges on which he had been disbarred, and that the charges had been sustained

have occasionally been construed as depriving the court of such power.<sup>2</sup> On a disbarred attorney's application for reinstatement, the character of the misconduct for which he was disbarred, the circumstances attending his offense, his previous and subsequent conduct, and his present attitude toward the court, are important considerations; but the ultimate and decisive question is whether the applicant is of good moral character and is a fit and proper person to be intrusted with the privileges of the office of an attorney;<sup>3</sup> in brief, whether the granting of his application would probably

by perjured testimony, and the representative of the Bar Association appearing before the referee approved his report and recommended the attorney's reinstatement: whereupon the attorney was reinstated. *In re Oppenheim*, 155 App. Div. 889, 139 N. Y. S. 1053. See an editorial on this case in IV. Bench and Bar. New Series, p. 11.

*Reinstatement on condition of good behavior* for two years, because conduct since disbarment had not been wholly free from blame. *Ex p. Davies*, 40 Leg. Int. (Pa.) 46.

<sup>2</sup> *In re Lamb*, 23 Q. B. D. (Eng.) 477, holding that where a court made an order striking from the rolls a solicitor under a statute providing that a solicitor offending against it "shall and may be struck off the roll, and forever after be disabled from practicing as an attorney or solicitor," the court had no power to reinstate him: *In re Forbes*, 2 N. W. Ter. 423, holding that the supreme court of the Northwest territories had no power to reinstate an advocate under the Legal Professions Ordinance of 1895. And in *In re Forbes*, 2 N. W. Ter. 447, it was held that the court could not effect the same result by rescinding the order striking the advocate from the rolls.

<sup>3</sup> *District of Columbia*.—*In re Adriaans*, 33 App. Cas. 203.

*Indiana*.—*Ex p. Walls*, 73 Ind. 95.

*Montana*.—*In re Weed*, 28 Mont. 264, 72 Pac. 653; *In re Weed*, 30 Mont. 456, 77 Pac. 50.

*New York*.—*Matter of Clark*, 128 App. Div. 348, 112 N. Y. S. 777. See also *In re Harrington*, 146 App. Div. 219, 130 N. Y. S. 920.

*North Dakota*.—*In re Simpson*, 11 N. D. 526, 93 N. W. 918.

Thus in *Matter of Clark*, 128 App. Div. 348, 112 N. Y. S. 777, a disbarred attorney's petition for reinstatement was denied where it appeared, among other things, that the offending acts extended over a considerable period of time, were not due to any sudden emotion or stress of circumstances, and were committed by an attorney who had been at the bar for a number of years. And in *Matter of Garbett*, 18 C. B. 403, 86 E. C. L. 403, a disbarred attorney was refused reinstatement where it appeared that he had been guilty of forgery and perjury. So in *Matter of Hawdone*, 9 Dowl. (Eng.) 970, it was held that a conviction of the disbarred attorney for a conspiracy to extort money by means of libels was a sufficient ground for refusing reinstatement. And in *Kennedy's Disbarment*, 178 Pa. St. 232, 35

promote the administration of justice.<sup>4</sup> This question has a broader significance than its purely personal aspect, and to persuade the court to reinstate an attorney, it must appear that his reinstatement will not be incompatible with the proper respect of the court for itself, and a proper regard for the dignity of the profession.<sup>5</sup> A disbarred attorney seeking reinstatement must, like a candidate for admission to the bar, satisfy the court that he is a person of good moral character,<sup>6</sup> and he has this burden whether or not op-

Atl. 995. the court refused to revoke an order disbarring an attorney from practice for embezzlement, where the revocation was sought on the ground that the attorney had been acquitted by a criminal court of the charge of embezzlement on the ground of insanity, had been placed in an insane asylum, and subsequently discharged therefrom as cured.

Where it appeared from the petition of a disbarred attorney who sought reinstatement that the larceny upon conviction of which he was disbarred, was committed while he was under the influence of intoxicating liquor; that he had never theretofore been convicted of any criminal offense; that since the order of disbarment was made he had become sober and had lived an upright, honorable life; that in the estimation of his fellow-citizens in the community in which he resided, and also of reputable members of the bar, he was a fit person to be permitted to practice law; and that he expressed the utmost contrition for his offense, the petitioner was reinstated. In re Newton, 27 Mont. 183, 70 Pac. 510, 982.

In another case the court, in reinstating a disbarred attorney, said that in doing so they were influenced somewhat by the knowledge that the misconduct for which the applicant was

disbarred resulted in a measure from inexperience and youthful indiscretion as well as a radical misconception of his duty as an attorney, and was induced largely by local sentiment, which openly encouraged his violation of official duty. In re Simpson, 11 N. D. 526, 93 N. W. 918.

*Modifying Judgment.*—A judgment of disbarment for unprofessional conduct was modified to a short suspension from practice, where it appeared that respondent regretted his misconduct, had otherwise borne a good reputation, was generally respected, and that he would probably prove to be a worthy attorney. In re Ramsey, 26 S. D. 352, 128 N. W. 176.

<sup>4</sup> In re Thatcher, 83 Ohio St. 246, Ann. Cas. 1912A 810, 93 N. E. 895.

<sup>5</sup> Matter of Clark, 128 App. Div. 348, 112 N. Y. S. 777; In re Palmer, 6 Ohio Cir. Dec. 179, 9 Ohio Cir. Ct. 55.

<sup>6</sup> In re Weed, 28 Mont. 264, 72 Pac. 653; In re Palmer, 6 Ohio Cir. Dec. 179, 8 Ohio Cir. Dec. 508; In re Egan, 24 S. D. 301, 123 N. W. 478, 27 S. D. 16, 129 N. W. 365.

In Ex p. Pyke, 6 B. & S. 703, 118 E. C. L. 703, wherein a disbarred attorney sought reinstatement, the court refused to reinstate him, unless he could satisfy them by the testimony of trustworthy persons, especially mem-

position is made to his application.<sup>7</sup> The mere formal proof of good character required upon an ordinary application for admission to the bar is not sufficient. The proof must be persuasive enough to overcome the court's former adverse judgment on the applicant's character.<sup>8</sup> Moreover, the fact that the disbarred attorney has lived an upright life since his disbarment does not alone entitle him to reinstatement.<sup>9</sup> An application for reinstatement by an attorney disbarred for embezzlement will be granted where reinstatement is unanimously recommended by the bar association of the county, no objection is made to granting it, and the court is satisfied that the attorney has been adequately punished and has sincerely repented.<sup>10</sup> While it is said that courts will not ordinarily reinstate an attorney where his petition for reinstatement follows closely upon his disbarment,<sup>11</sup> and while his good conduct during a long interval after his disbarment is properly regarded as a circumstance favorable to his application,<sup>12</sup> yet there is one remarkable case in which a court reinstated an attorney im-

bers of the profession, that his conduct and character had been unimpeached and unimpeachable in the meantime; but afterwards dispensed with this on his showing that he could not obtain such testimony in consequence of his having lived during that period in complete retirement.

Where finding of facts does not show affirmatively that the petitioner seeking reinstatement is a man of good moral character, it is equivalent to an adverse finding in that respect, and a finding that in his business relations outside of his profession he has been honest and upright, is not equivalent to finding that he is a person of good moral character. *Ex p. Walls*, 73 Ind. 95.

<sup>7</sup> *Ex p. Walls*, 73 Ind. 95.

<sup>8</sup> *In re Simpson*, 11 N. D. 526, 93 N. W. 918. See also *Matter of Clark*, 128 App. Div. 348, 112 N. Y. S. 777.

<sup>9</sup> *Matter of Clark*, 128 App. Div. 348, 112 N. Y. S. 777; *In re Palmer*,

8 Ohio Cir. Dec. 508, 15 Ohio Cir. Ct. 94.

<sup>10</sup> *In re Hawkins*, (Del.) 87 Atl. 243.

<sup>11</sup> *Matter of Clark*, 128 App. Div. 348, 112 N. Y. S. 777.

<sup>12</sup> *In re Burris*, 147 Cal. 370, 81 Pac. 1077, a disbarred attorney was reinstated, it appearing that the order of disbarment was made more than ten years previous to the application upon a charge of professional misconduct, involving no criminality, and no serious wrong to anyone, though inexcusable in itself; that since that time the petitioner had lived a life of probity, industry and sobriety, as was shown by the testimonials of many judges and prominent attorneys, and that the judge in whose court the matter was pending out of which the charge of misconduct leading to the petitioner's disbarment arose recommended the petitioner's restoration.

*In re Adriaans*, 33 App. Cas.

mediately after his disbarment.<sup>13</sup> Whether the hearing is in an original proceeding to remove from the bar, or upon an application for reinstatement, it involves no consideration respecting the punishment of the respondent, since his exclusion merely annuls an extraordinary privilege originally conferred in reliance upon his possession of good character, and leaves him in the full enjoyment of all the rights of citizenship.<sup>14</sup> Similarly, as attorneys are disbarred not primarily as a punishment to them but as a protection to the court and the community, it is not sufficient ground for reinstatement that the disbarred attorney has been sufficiently punished for the cause for which he was removed.<sup>15</sup> Neither is an attorney entitled to reinstatement merely because he has been pardoned of the offense for which he was disbarred. The pardon does not reinstate him or require that the court do so,<sup>16</sup> for the pardon does not imply innocence, or change the fact of past guilt, or re-invest its recipient with a good moral character.<sup>17</sup> In New York,

(D. C.) 203, an attorney disbarred from practicing in the court of appeals of the District of Columbia, but not from practicing in the supreme court in the district, was reinstated, it appearing that his disbarment was due to misconduct in making scandalous charges against another attorney in certain proceedings in the police court attempted to be brought to the Court of Appeals by writ of error; that the disbarment occurred nine years previously, and that he was at the time of his application for reinstatement still a member of the bar of the supreme court of the district, in good standing, with no charges of any kind pending against him in any court.

<sup>13</sup> In *People v. Essington*, 32 Colo. 168, 75 Pac. 394, the court ordered the disbarment of an attorney, and at the same time ordered his reinstatement; the court saying that, while they could not exonerate him, the promptings of mercy compelled them to extend to

him their judicial clemency, it appearing that he was admitted to the bar of Pennsylvania some time prior to the Civil War; that he entered the Union Army and served for more than four years; that he had resided in Colorado for the period of fifteen years, and that his conduct had been exemplary except in the instances charged in the information in the proceedings.

<sup>14</sup> In *re Thatcher*, 83 Ohio St. 246, Ann. Cas. 1912A 810, 93 N. E. 895. See also *Matter of Clark*, 128 App. Div. 348, 112 N. Y. S. 777.

<sup>15</sup> In *re Enright*, 69 Vt. 317, 37 Atl. 1016.

<sup>16</sup> *Matter of E—*, 65 How. Pr. (N. Y.) 171.

A pardon by the President of the United States of an attorney who had engaged in the Rebellion does not restore his standing in a state court. *Ex p. Quarrier*, 4 W. Va. 210.

<sup>17</sup> *Matter of —*, 86 N. Y. 563;



however, a statute now provides that when an attorney has been disbarred for conviction of a crime, the appellate division of the supreme court shall have power to vacate or modify the order of disbarment upon a reversal of the conviction or upon the granting of a pardon by the President or the Governor.<sup>18</sup> It has been held that an attorney disbarred or suspended for failure to pay over money to a client must, as a condition precedent to his reinstatement, repay to his client the amount withheld, or at least as much as it is in his power to repay.<sup>19</sup> But, on the other hand, it has been said that restitution of the money embezzled will not as a rule be given very much weight, as it might depend more upon the attorney's financial ability or other favoring circumstances than upon repentance or reformation.<sup>20</sup>

**§ 903. Procedure.**—The procedure prescribed by general statutes for a new trial or rehearing does not apply to an application by a disbarred attorney for reinstatement; nor is such an application restricted to procedure in the nature of a bill of review or other equitable or common-law remedies, since neither the original nor the appellate power of the court in respect to its statutory or common-law or equity jurisdiction is exclusively invoked.<sup>1</sup> Regular pleadings are not necessary, nor has the applicant a right to have the questions of fact passed upon by a jury.<sup>2</sup> The generally accepted practice is for the applicant to present to the court a petition setting forth the facts upon which he bases his claim for reinstatement; and the petition may properly be accompanied by the recommendations of judges, practitioners, and other citizens of his community, which will usually have weight with the court.<sup>3</sup> If

Matter of E——, 65 How. Pr. (N. Y.) 171. See also *supra*, § 863.

<sup>18</sup> N. Y. Judiciary Law, § 88 (2), amended by Laws of 1912C 253.

<sup>19</sup> In re Poole, L. R. 4 C. P. (Eng.) 350; Ex p. Browne, 2 Colo. 553; *McMath v. Maus Bros. Boot & Shoe Store*, 15 S. W. 879, 12 Ky. L. Rep. 952.

<sup>20</sup> In re Hawkins, (Del.) 87 Atl. 243.

<sup>1</sup> In re Evans, (Utah) 130 Pac. 217.

<sup>2</sup> Ex p. Walls, 73 Ind. 95.

<sup>3</sup> See In re Burris, 147 Cal. 370, 81 Pac. 1077; In re Adriaans, 33 App. Cas. (D. C.) 203; In re Newton, 27 Mont. 182, 70 Pac. 510, 982; In re Weed, 30 Mont. 456, 77 Pac. 50.

Such recommendations, however, will not outweigh the graver considerations induced by the fact that the grounds of the disbarment were gross

the petition is addressed to the clemency of the court, it should contain an acceptance of the views of the court as to the respondent's past conduct, and an expression of contrition and reformation.<sup>4</sup> The proceeding may, however, take the form of a petition for a rehearing or review of the record of disbarment, especially where the application is based primarily on errors in the record rather than on matters subsequent to the judgment;<sup>5</sup> and in such a case the judgment cannot be relied on as *res judicata*, but may be vacated or modified.<sup>6</sup> The applicant must appear before the court in person or by his petition subscribed by him and giving his reasons for the application; and unless he does so the petition of other persons for his reinstatement will not be considered.<sup>7</sup> But

professional misconduct involving crime. *In re Clark*, 128 App. Div. 348, 112 N. Y. S. 777.

The unanimous recommendation of the bar association of the county where the applicant had lived since his disbarment would be accepted as a fair reflex of public sentiment, without calling prominent and representative citizens as witnesses in the applicant's behalf. *In re Hawkins*, (Del.) 87 Atl. 243.

*Renewal of Petition.*—In *In re Sullivan*, 185 Mass. 426, 70 N. E. 441, an order of the supreme court refusing to reinstate a disbarred attorney recited that the petition for reinstatement was "denied without prejudice to his filing another petition of like tenor after July 1, 1906." It was held that the part of the order which related to the filing of another petition was not illegal. The court said: "If the order stopped with the word 'denied,' and if a petition founded on the same averments should be hereafter filed, the court might treat the matter as *res judicata*, and hold that the judgment on this petition was a bar. It was doubtless for the benefit

of the petitioner and to relieve him from this effect of the order on a petition filed after July 1, 1906, that the provision as to another petition was added. We do not understand the provision as intended to preclude the petitioner from a hearing on the merits, upon a petition filed before July 1, 1906, founded on facts not included in the present petition. Doubtless the court could not make an order which would have that effect. We construe this part of the order as wholly favorable to the petitioner, and as free from legal objection."

<sup>4</sup> *In re Thatcher*, 83 Ohio St. 246, Ann. Cas. 1912A 810, 93 N.E. 895; *In re Egan*, 27 S. D. 16, 129 N. W. 365.

<sup>5</sup> *In re Evans*, (Utah) 130 Pac. 217. See *supra*, § 896 et seq.

<sup>6</sup> *In re Evans*, (Utah) 130 Pac. 217. See also *In re Sullivan*, 185 Mass. 426, 70 N. E. 441.

<sup>7</sup> *In re Welleome*, 25 Mont. 131, 69 Pac. 836; *In re Pemberton*, (Mont.) 63 Pac. 1043; *In re Newton*, 27 Mont. 182, 70 Pac. 510, 982.

The petition must be verified, and should comply in all respects with the rules applicable to the admission of

proceeding for readmission, as upon application and examination in the first instance, is not the proper course.<sup>8</sup> Sometimes the court will cause opposition to be made to the application,<sup>9</sup> or will direct a local bar association,<sup>10</sup> or a committee of the state bar association, to intervene in the proceedings,<sup>11</sup> or will appoint counsel to act in the matter as *amici curiae*.<sup>12</sup> Such a practice is commendable and salutary, for without it a proceeding for reinstatement would be *ex parte* throughout and susceptible of great abuse.<sup>13</sup>

attorneys to practice in the first instance. In *re* Newton, 27 Mont. 182, 70 Pac. 510, 982.

<sup>8</sup> *Matter of King*, 54 Ohio St. 415, 43 N. E. 686, where the court said: "And to make such application without communicating to the court the fact that the applicant had been disbarred, indicates a want of moral sense inconsistent with the character of an honorable attorney."

<sup>9</sup> It has been held to be within the power of the court to secure a petition

against the proposed readmission, and to appoint certain of the petitioners to resist the application. *Ex p. Walls*, 73 Ind. 95.

<sup>10</sup> *Nugent v. Metropolitan St. R. Co.*, 146 App. Div. 775, 131 N. Y. S. 423.

<sup>11</sup> See *In re Simpson*, 11 N. D. 526, 93 N. W. 918. And see *In re Egan*, 24 S. D. 301, 123 N. W. 478.

<sup>12</sup> *In re Evans*, (Utah) 130 Pac. 218.

<sup>13</sup> *Ex p. Walls*, 73 Ind. 95.



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